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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 279.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY, APPELLANT,

vs.

THE DISTRICT OF COLUMBIA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED SEPTEMBER 25, 1880.

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1 In the supreme court of the District of Columbia.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY
vs.
THE DISTRICT OF COLUMBIA AND WILLIAM DENNISON, SETH L. PHELPS, AND THOMAS B. BRYAN, COMMISSIONERS OF THE DISTRICT OF COLUMBIA. } Equity. No. 5673.

Bill of Complaint.—Filed July 9th, 1877.

The bill of complaint of the Washington and Georgetown Railroad Company against the above-named defendants, respectfully shows as follows, to wit:

First. The complainant is a corporation duly organized and carrying on the business of transporting passengers for hire, by virtue of the provisions of an act of Congress entitled "An act to incorporate the Washington and Georgetown Railroad Company," approved May 17th, 1862;
2 and the defendant, the District of Columbia, is a municipal corporation created by various acts of Congress; and the three other defendants are Commissioners of the District of Columbia, deriving their power from an act of Congress approved June 20th, 1874, and other acts amendatory thereof and in addition thereto.

Second. The complainant's railroad tracks pass along and upon Pennsylvania avenue, in the city of Washington, from First street to Fifteenth street west.

By virtue of an act of Congress entitled "An act authorizing the repavement of Pennsylvania avenue," approved July 19, 1876, H. G. Wright, Q. A. Gillmore, of the Engineer Corps of the Army of the United States, and Edward Clark, of the city of Washington, were constituted a commission whose duty, as specified by said act, was to select and determine the best kind of pavement to be used in paving Pennsylvania avenue and the intersections of streets and alleys crossing the same, and to have said avenue paved with such pavement from the northwest gate of the
3 Capitol grounds to and including the crossing of Fifteenth street west. Said commissioner was further authorized by said act to enter into contracts for furnishing the materials and performing the labor necessary to prepare and put down such pavement upon the said avenue, and to keep the same in repair.

Third. The said commission, on the 21st day of August, 1876, acting in behalf of the United States, concluded a contract with the Grahamite and Trinidad Asphalt Pavement Company to pave the said avenue from the west side of Fifteenth street to the east side of Sixth street; and also, on the same day, entered into a contract with the North American Neuchatel Rock Paving Company to pave the said avenue from the east side of said Sixth street to the gate of the Capitol grounds with a pavement known as a concrete pavement, consisting of a foundation of hydraulic cement surmounted by layers of asphalt, concrete, or Neuchatel rock
4 (which is a natural stone impregnated with asphalt), such being the

kind of pavement selected by the said commission as the best kind of pavement to be used in paving the said avenue and intersecting streets and alleys, in pursuance of the provisions of the said act of Congress. Copies of the said contracts are herewith filed, marked respectively Exhibit A and Exhibit B, and referred to as a part of this bill.

Fourth. In addition to the contracts hereinbefore mentioned, the said commissioners entered into an informal contract with one John J. Burrows to perform certain work in and about resetting manholes and stop-cock boxes for water, and for other plumber's work and brick-work in and about the said avenue, and also about the footwalks along the same. The agreement with the said John J. Burrows was based upon certain proposals made in writing by him, copies of which are herewith filed, marked Exhibit C, and referred to as a part of this bill; which proposals were accepted by said commissioners.

5 Fifth. On the 8th day of July, 1870, an act of Congress was approved, entitled "An act to provide for the paving of Pennsylvania ave.," in pursuance of which the said avenue was paved with wood, and that portion of the avenue lying between the exterior rails of the tracks of the railroad of this complainant was paved with cobble-stones, and it was in good condition and a substantial and permanent pavement, as well, if not better, adapted to the purposes for which it was intended as any other pavement that could have been selected from the various kinds of pavement now known; but the other portions of Pennsylvania avenue outside of and beyond the outer rails of said track were in bad condition, in consequence of the said wood pavement put down in pursuance of the said act of Congress of July 8, 1870. The material selected by the paving commission appointed under said act of 1870 was very bad, and the work done and materials furnished for such pavement under the provisions of the said act were, practically, a fraud upon the tax-payers of the

6 District of Columbia and the city of Washington, and particularly upon this complainant and the property holders abutting upon Pennsylvania avenue.

Sixth. After the organization of the said commission under the act of July 19, 1876, the grades of the said avenue were established by and under the direction of the said commission and were given to the executive officers of the complainant, and thereupon the complainant altered the grade of that portion of the avenue upon which its railroad tracks are located, and of the space between said tracks, to conform to the directions and grades thus established by the said commission, and took up the said cobble-stone pavement upon and between its tracks, for that purpose. If the company had been allowed to relay the said cobble-stones, it could have been done with a very slight cost, but the said commission, under the provisions of the third section of said act of Congress of July 19, 1876, directed the complainant to use Belgian rock in repaving its railroad tracks and the space between them. The complainants accordingly,

7 after having completed the grading, paved the said tracks and the said space with Belgian rock in a good and workmanlike manner and to the satisfaction of the said commission; and the complainant has paid all the costs and expenses of the said pavement and of grading the said portion of the avenue in conformity with the directions and plans of the said commission.

Seventh. By the terms of the said act of Congress of July 19, 1876, the complainant is required to bear so much of the expense of the said pavement as is properly chargeable on account of the two feet immediately outside of and abutting against the exterior rails of its road. The said paving commission unlawfully assumed the authority and power to place along the outer side of the exterior rails of the said railroad tracks a line of elaborately dressed blue-stone, five inches in width, about eight inches deep, and about three feet long, and of a very expensive quality and finish.

8 The complainant was not consulted in regard to this line of curb-stone, nor did its officers have any information of the extravagant character of the dressing of the said stones, and they were informed by the said commission that said curbing would be charged in the general cost of the entire work and would not be a separate burthen upon the railroad company. The said line of curb is of no benefit whatever to the complainant's road; it forms no part of the pavement so selected, nor was it in the least necessary in the construction of the said pavement; and, even if the line of curb was necessary, an undressed curb would have been much better than the said dressed stone, and would have cost but a trifling sum in comparison with the stone which was used. The complainant is advised and believes, and therefore avers, that the said paving commission had no authority of law to place any curbing whatsoever along the line of the said railroad track, and that the expense thereof cannot, therefore, be charged upon the railroad company nor upon the property holders along the line of said railroad and avenue.

9 Eighth. The complainant is advised by counsel, and therefore avers, that said paving commission had no right or lawful power under and by virtue of the said act of Congress of July 19, 1876, to make the aforesaid agreement with John J. Burrows to reset the curb-stone along the footways of the said avenue or to regrade or repave the footways, and that said contract with the said Burrows, so far as the same relates to the resetting of curbs, or grading, or repaving the footwalks, is unlawful and without authority of law, and therefore null and void, and the expense of such grading and of resetting such curb-stone and relaying such footwalks having been undertaken and performed by the said commission without authority of law, cannot be charged in the expense of paving Pennsylvania avenue, and more especially can it not be charged to the railroad company, the said railroad company having received no benefit whatsoever from such work.

10 The work done by said Burrows under his said agreement was, as complainant is informed and believes, of the value of $2,318.04, but what portion of that sum is properly chargeable on account of taking up and resetting curbs and footwalks and grading the footwalks does not appear, and complainant cannot state, but the complainant is advised and believes that such work is and was within the exclusive jurisdiction and duties of the municipal authorities of said District of Columbia, and that the expense thereof was chargeable according to the general laws of said District, and therefore was not within the control or duties of said paving commission.

Ninth. After the plan of grading the said avenue had been furnished to the officers of the railroad company for the purpose of enabling them to grade their tracks, and after they had performed all the work thereof and reduced their track so as to be uniform with the grade established

and required by the said commission, and after they had finished
11 the work of paving their tracks and the space between them, the said commissioners, in excavating Pennsylvania avenue adjoining the two feet next to the railroad tracks, dug away the earth under the railroad tracks to some considerable extent, and thereupon it became necessary, in consequence of the extraordinary depth of such excavating, to underpin a portion of the tracks of the complainant's road, and this work of underpinning was performed by or under the directions of said commission, and was attended with considerable expense. This underpinning was and is no part of the railroad track, and was only made necessary by the excavations made by said commission, for which the complainant was in no way responsible.

Tenth. The complainant having furnished the labor and materials necessary to grade that portion of Pennsylvania avenue lying under its railroad tracks and the space between them, and of paving all
12 the space between the outer rails of its tracks with Belgian stone, as directed by the commission, the said commission, after the completion of the pavement of the said avenue, ascertained the total cost of the said pavement, exclusive of the expense of grading and paving said railroad company's tracks and the space between them, and included in the total expense of the said work the work done by the said John J. Burrows, the curbing placed along the outer rails of the said railroad tracks, and the underpinning of the said railroad tracks, and the incidental expenses connected with the said improvement, and then apportioned the whole expense amongst the persons and corporations chargeable under the provisions of the said act of July 19, 1876, with such burthen, and reported the same to the Commissioners of the District of Columbia in order that said Commissioners of the District of Columbia might assess the cost thereof according to law (a copy of the said apportionment, made and certified by the said
13 paving commission to the Commissioners of the District of Columbia, is herewith filed, marked Exhibit D, and referred to as a part of this bill of complaint). But the said Commissioners of the District of Columbia, misapprehending their duty and assuming authority which they did not possess, undertook to set aside, and did wholly disregard the said apportionment made by the said paving commission, and undertook to and did unlawfully reapportion the said expense, and in such reapportionment charged to the complainant all the expense of the said unlawful and unauthorized curb placed along the outer rails of the said railroad tracks, all of the expense of underpinning its railroad tracks, and its proportion of the incidental expense, making the sum total of the said charges against the railroad company $19,886.69. The said sum total is made up by the said Commissioners of the District of Columbia, in their said unlawful apportionment as follows:

For 2,375.47 yards of pavement, at $3.78	$8,979	27
14 " 13,537.19 linear feet of curb, at 70 cts	9,476	59
" 13,584.49 " " " underpinning, at $0.07.1½	1,052	12
" incidentals	378	71
	$19,886	69

The amount found to be due from the Washington and Georgetown Railroad Company, according to the apportionment of the said paving

commission, is $12,207.27 only. And the said Commissioners of the District of Columbia thereupon undertook to make an assessment, under the provisions of the said act of Congress of July 19, 1876, according to the said apportionment made by themselves, and declared that there was due from the Washington and Georgetown Railroad Company, in consequence of the said apportionment of said expense, the said sum of $19,886.69, and have given notice to the complainant that, if the said sum of money shall not have been paid at the expiration of thirty days, they will issue certificates of indebtedness against the property of this company according to the provisions of the said act of Congress. A true copy of the said notice
15 and of said assessment is herewith filed, marked Exhibit E, and referred to as a part of this bill of complaint. And the complainant is advised by counsel, and believes, that if the said certificates shall be issued by the said commissioners, that the said company will be irreparably injured. That the said assessment appears to be regular and lawful upon its face, and that to establish the facts in this bill set forth and alleged, and to show that such assessment is unlawful, it will be necessary to produce before this court extrinsic evidence not contained in the record touching said proceeding. The said Commissioners have not only charged to the complainant, the Washington and Georgetown Railroad Company, the pro rata expense of the pavement within two feet of its outer railway tracks, all the expense of said underpinning appertaining to its railway tracks, and all the expense of said blue-stone curbing, but they
16 have also charged the pro rata share of the expense of resetting the curb, grading and repaving the footways, under the pretended agreement with the said John J. Burrows; and they have also charged the pro rata share of the incidental expenses charged in the expense of the said work.

Eleventh. The complainant further shows that, under the provisions of the act of 1870, providing for the paving of Pennsylvania avenue, it expended between the 1st of Dec., 1870, and the third day of January, 1871, the sum of $11,175.13 for paving the space two feet beyond the outer rails of the said tracks with said wood pavement, and that it has paid for regrading the said portion of the said avenue and that portion between the outer rails, under the act of 1876, and for repaving the same with Belgian rock, the sum of $23,191.85, and that such charges are unlawful, unreasonable, and ruinous. It denies the power of Congress to require it to expend money for repaving the space between its railroad tracks
17 when the same is in good repair; and it says that the said paving commission had no lawful right to require it to put down Belgian rock instead of using the cobble-stone, which was on the said portion of the avenue prior to the passage of the said act of 1876.

Twelfth. The language of the last-named act providing for the apportionment of the expense of the proposed pavement is substantially the same as that of the act of 1870; the commission in charge of the pavement of 1870 ascertained the entire cost of that pavement, and then apportioned the same amongst the persons chargeable therewith according to the portion of the pavement for the cost of which they were respectively responsible.

Thirteenth. The complainant, while asserting that it was not bound to pay for any of the increased expense caused by the use of the Belgian rock

as a pavement, as aforesaid, and that they are not bound by law to
18 pay for any of the expense of the said curbstone which was entirely unnecessary and without benefit to the property of the railroad company, is, notwithstanding these unlawful assessments, ready and willing to pay its proportion of the entire expense of the said pavement as apportioned by the said paving commission, to wit, the sum of $12,207.27; and it hereby avers it readiness and offers to bring the said sum of money into court, to be disposed of according to the order of the court; and it makes this offer to pay this large sum of money in addition to the heavy expense it has already paid, not because there is any legal obligation resting upon the said railroad company to pay the said sum, but for the sake of avoiding litigation, and by way of compromise.

Fourteenth. The complainant further shows that it ought not to be charged unequally for the expense of paving Pennsylvania avenue, as compared with the other persons who are charged with a proportional
19 part of the said expense. The expense of the said curb-stone alone, which has been charged to the railroad company by the Commissioners of the District of Columbia, exceeds the total expense of all its portion of the pavement chargeable according to said act of Congress to this company. The said act of Congress of 1876 limits the expense and cost of the said pavement to $4.30, and the contract price of putting down and completing the said pavement in pursuance of the said act of Congress was $3.78 only; and according to the unlawful apportionment made by the Commissioners of the District of Columbia the cost of that portion of said pavement chargeable to the Washington and Georgetown Railroad Company will amount to over $6.60 per square yard.

Fifteenth. The said Commissioners of the District of Columbia threaten to issue certificates, under the said statute, against the property of the complainant, and, by the terms of the said act of Congress, such
20 certificates are declared to be liens upon the railroad tracks of this complainant; and this complainant is advised by counsel and verily believes, and therefore avers, that the issuing of the said certificates by the Commissioners of the District of Columbia, if they be permitted to issue said certificates, will create a cloud upon the title of the complainant's property. That the said assessment made by the Commissioners of the District of Columbia is apparently valid; and the said certificates issued in pursuance thereof will be apparently valid; and it will require evidence outside of the records of such assessment and of such certificates, both verbal and written, to establish the invalidity of such assessment and of such certificates, according to the averments of this bill of complaint.

That if the Commissioners of the District of Columbia shall be permitted to issue the said certificates upon and against the property of the complainant, the complainant will necessarily be involved in a multi-
21 plicity of suits in order to defend itself against the wrong and injury which the said Commissioners of the District of Columbia have attempted to perpetrate upon it; and it is advised by counsel and verily believes, and therefore avers, if the said certificates shall be issued by the said Commissioners, it will suffer irremediable mischief and injury, and be put to great and needless expense.

Sixteenth. The expense of the said pavement has been assessed upon a great deal of other property in addition to that of the complainant, and

the persons who are interested therein, and whose property has been, or will be, attempted to be charged with the said expense are very numerous, and many of them are entirely unknown to your complainant, and the number of such persons is so great that it would be impracticable to make them parties to this cause.

The complainant therefore prays as follows:

1. That the writ of subpœna of the United States may be issued
22 in due form of law by the clerk of this court, directed to each of the defendants hereinbefore named, requiring them and each of them to answer the allegations of this bill upon oath.

2. That the writ of injunction may be issued, directed to the defendant the District of Columbia and to the defendants William Dennison, Seth L. Phelps, and Thomas B. Bryan, Commissioners of the District of Columbia, restraining them and each of them, their collector of taxes, officers, agents, and attorneys, and each and every one of them, from preparing or issuing any certificate or certificates based upon the said assessment made by the said Commissioners of the District of Columbia against said railroad, and from in any manner proceeding or attempting to collect the said assessment.

3. That it may have such other and further relief in the premises as it may be entitled to have in equity and good conscience.

WASHINGTON AND GEORGETOWN RAILROAD COMPANY,
P'r H. HURT, *P't.*

ENOCH TOTTEN,
Sol'r for Pl'tf.

23 DISTRICT OF COLUMBIA,
County of Washington, ss:

Henry Hurt, being first duly sworn, doth depose and on his oath say that he is the president of the Washington and Georgetown Railroad Company, the complainant of this cause, that he has read the foregoing bill of complaint by him subscribed, and knows the contents thereof, that the facts therein stated, upon personal knowledge, he knows to be true; and that the facts therein stated upon information and belief he believes to be true.

H. HURT.

Subscribed and sworn to before me this 9th day of July, A. D. 1877.
[NOTARIAL SEAL.] JAMES NICH'S CALLAN,
Notary Public.

24 *Exhibit A, with bill.—Filed July 9th*, 1877.

This agreement, made and concluded this twenty-first day of August, 1876, between Gen. H. G. Wright, Gen. Q. A. Gillmore, and Mr. Edward Clark, constituting a commission appointed in the act of Congress authorizing the repavement of Pennsylvania avenue, approved July 19th, 1876, the party of the first part, for and in behalf of the United States, and the Grahamite and Trinidad Asphalt Pavement Company, the party of the second part, witnesseth:

That the said party of the second part has agreed, and by these pres-

ents doth agree, to furnish all the material and to do and perform all the work authorized by said act approved July 19th, 1876, upon that portion of Pennsylvania avenue, in the city of Washington, D. C., lying between the east side of Sixth street and the west side of Fifteenth street, including the triangular spaces mentioned in said act, but not including the spaces between the exterior rails of the Washington and Georgetown Railroad, and the spaces between the exterior rails of any other railroad on or crossing said avenue; and also to do and perform all other work necessarily incidental thereto and properly constituting a part of the work of repaving said portion of Pennsylvania avenue, comprising the removal of the present pavement and the delivery of the same to the Commissioners of the District of Columbia, and all the work necessary for the thorough preparation of the ground for receiving the foundation of the new pavement, including all excavations to the new grade, the removal of soft and spongy soil, the tapping and draining of springs, and the filling, ramming, and rolling of the road-bed in such manner and to such new grades as said party of the first part shall direct; the rectification of the lines of curbs whenever required, and supplying all materials for and constructing a new pavement on said portion of said avenue upon the grade and cross-sections adopted by said party of the first part; and all the expense resulting from the changes of grades and of cross-sections, except the expense of altering the grades of the Washington and Georgetown Railroad and of railroads crossing of said avenue, shall be borne by the said party of the second part.

The said party of the second part further covenants and agrees that the new pavement to be laid shall consist of a monolithic foundation of hydraulic concrete, eight inches thick, surmounted by two layers of asphalt concrete, as prepared by the Grahamite & Trinidad Asphalt Pavement Company, the lower layer to be not more than one-half inch thick, and the upper or surface layer full two inches thick, so as to give full two and one-half inches thickness of asphalt concrete in every part thereof, prepared and laid in a skillful and workmanlike manner, substantially as described in the specification accompanying the proposal of the said Grahamite and Trinidad Asphalt Pavement Company, bearing date New York, Aug. 7th, 1876, and signed by W. W. Averell, president, and H. H. Porter, secretary. The hydraulic concrete of the foundation shall be composed in the proportions of one barrel, or 300 lbs., of good hydraulic cement, two and one-half barrels, loosely measured, of clear, sharp sand, tempered together with a suitable quantity of water, and five barrels, loosely measured, of broken stone and gravel mixed together in the proportion of six measures of the stone to four measures of gravel, or such other proportion of cement, sand, stone, and gravel as the party of the first part shall direct, and in laying the foundation the concrete shall be compacted by thorough ramming in all respects as the party of the first part shall direct or prescribe. The broken stone in the concrete shall be of random sizes, capable of passing through a circular ring two inches in diameter, and be free from detritus and dust, and the gravel shall be clean and of random sizes, from that of a large pea to that of a pigeon's egg. The upper or full two-inch layer of asphalt concrete shall be of the best quality for paving purposes, and shall be well and uniformly compacted, and possess a smooth and even surface, and shall be

fully equal in strength, toughness, hardness, and durability to that laid on Fifth avenue, near the Worth Monument, in New York City, a piece of which was cut out and delivered to the party of the first part as the standard of quality.

28 The said party of the second part further covenants and agrees to keep the whole of said pavement in good repair, without charge, for the term of three years from the time of the completion of the entire work, and to make said repairs, if any shall become necessary, at such times as the said party of the first part shall direct, and to restore the asphalt concrete to a minimum thickness of two and a quarter inches, without charge, on all portions of said pavement where its thickness shall have been reduced to less than two and a quarter inches, at or before the expiration of said three years; but the said party of the second part shall not be required to repair any injuries caused by tearing up any part of said pavement in order to repair, lay, or relay gas or water pipes or sewers, or for other purposes.

The party of the second part further covenants and agrees to provide and set a line of curb of North River blue-stone of best quality against the outer face of the outer stringers of all railroad tracks which traverse the avenue longitudinally and transversely between Sixth and Fifteenth streets, the stones to be smooth on the upper surface and fit closely against the stringer and rail, and have a true and full width of five inches,

29 with a draft-line two and a half inches deep on the outer face, a length of not less than two feet on the straight portions of the tracks, and one foot on the curves, and a depth of eight inches, and said curb-stones shall be close-jointed on the ends, and shall be firmly set in mortar on the concrete foundation, and said foundation shall extend down to the lower surface of the cross-ties of the railroad for a width of one foot along the stringer, and be firmly bonded to the rest of the pavement-foundation, and a joint of cement-mortar shall be placed under the curb-stones wherever they rest upon a cross-tie.

The party of the second part further covenants and agrees that all the pavement hereinabove described shall be fully completed and ready for use on or before the 15th Jan., 1877, and that no hydraulic concrete shall be laid when, in the judgment of the party of the first part, the road-bed is not in fit condition to receive it, or the weather is so cold as to injure the cement, or prevent or seriously retard its setting. The party of the second part further covenants and agrees to promptly remove all

30 its materials and rubbish from the street when the pavement is finished, and before the same is paid for and opened for traffic.

The commission constituting the party of the first part, in consideration of the faithful performance of all and several of the foregoing covenants and agreements by the party of the second part, covenants and agrees, for and in behalf of the United States, to pay to the party of the second part, by a warrant or order on the Secretary of the Treasury, the sum of $3.78 for each and every superficial yard of pavement, and 70 cts. per linear foot of curbing, including its foundation, along the railroad tracks, the same being constructed and completed by the said party of the second part in accordance with the terms of this agreement and to the satisfaction of the party of the first part; said payments to be made from time to time, if funds be available for the purpose, as often as five thousand superficial

yards of said finished pavement are accepted by the party of the
31 first part, reserving, however, such portion not exceeding twenty per cent. on the contract price of said finished pavement, as the party of the first part shall deem proper.

When the entire work shall have been completed in accordance with the conditions of this agreement, the reserved balance will, if funds be available, be paid over to the party of the second part in the manner hereinbefore described, with the exception of ten per centum of the entire cost of the work, which will be retained as provided in the second section of the act approved July 19, 1876, and invested in the bonds of the United States, the interest thereon being paid to the party of the second part.

It is further covenanted and agreed by and between the parties of this agreement, that if the said party of the first part shall require a greater thickness of foundation than eight inches for any portion of said pavement, the party of the second part shall lay such additional thickness and be paid therefor at the rate of twelve cents per superficial yard for
32 each additional inch of thickness over and above the said eight inches.

It is further covenanted and agreed between the parties of this agreement that all the materials used in said pavement shall be approved by the party of the first part.

It is further covenanted and agreed that the party of the first part reserves the right to annul this contract whenever in their judgment the party of the second part shall fail to prosecute the work with due and proper diligence, or shall fail to use such materials or do the work in such manner as the party of the first part shall approve.

And it is further expressly understood and agreed that no claim whatever shall at any time be made upon the United States by the party of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished, under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have
33 been expressly required in writing by the party of the first part, or their successors, the prices and quantities thereof having been first agreed upon by the contracting parties.

And it is also further agreed by the party of the second part, as required by the fourteenth section of the act of Congress approved July 17, 1862, that neither this contract nor any interest therein shall be transferred to any other party or parties, and that any such transfer shall cause the annulment of the contract as far the United States are concerned.

No member of Congress, officer, or agent of the government, or any person employed in the public service shall be admitted to any share herein, or any benefit which may arise herefrom.

In witness whereof the undersigned have hereunto placed their hands and seals the day and date first above written.

34 *Exhibit B, with bill.*

This agreement, made and concluded this 23rd of Aug., 1876, between Gen. H. G. Wright, Gen. Q. A. Gillmore, and Mr. Edward Clark, constituting a commission appointed in the act of Congress authorizing the

repavement of Pennsylvania avenue, approved July 19, 1876, the party of the first part, for and in behalf of the United States, and the North American Neuchatel Rock Paving Company (limited), the party of the second part, witnesseth:

That the said party of the second part has agreed, and by these presents doth agree, to furnish all the materials and do and perform all the work authorized by said act, approved July 19, 1876, upon that portion of Pennsylvania avenue in the city of Washington, D. C., lying between the east side of Sixth street and the northwest gate of the Capitol grounds, but not including the spaces between the exterior rails of the Washington and Georgetown Railroad; and also to do and perform all other work necessarily incidental thereto and properly constituting a part of the work of repaving said portion of Pennsylvania avenue, comprising the
35 removal of the present pavement and the delivery of the same to the Commissioners of the District of Columbia, and all other work necessary to the thorough preparation of the ground for receiving the foundation of the new pavement, including all excavations of the new grades, the removal of soft and spongy soil, the tapping and draining of springs, and the filling, ramming, and rolling of the road-bed in such manner and to such new grades and side slopes as said party of the first part shall direct; the rectifications of the lines of curb wherever required, and supplying all the material and constructing a new pavement on said portion of said avenue upon the grades and cross-sections adopted by said party of the first part, and all the expense resulting from the changes of grade and of cross-sections, except the expense of altering the grades of the Washington and Georgetown Railroad, shall be borne by the said party of the second part.

The said party of the second part further covenants and agrees that the new pavement to be laid shall consist of a monolithic foundation of hydraulic concrete, full eight inches thick, surmounted by a
36 layer of Neuchatel bituminous limestone of the best quality, prepared and laid and thoroughly compacted in a skillful and workmanlike manner to a thickness of full one and one-half inches in every part thereof, and to a smooth and even surface. The hydraulic concrete of the foundation shall be composed in the proportions of one barrel, or 300 lbs., of good hydraulic cement, two and one-half barrels, loosely measured, of clean, sharp sand, tempered together with a suitable quantity of water, and five barrels, loosely measured, of broken stone and gravel mixed together in the proportion of six measures of the stone to four measures of the gravel, or such other proportions of cement, sand, and stone, and gravel as the party of the first part shall direct; and in laying the foundation the concrete shall be compacted by thorough ramming in all respects as the party of the first part shall direct or prescribe. The broken stone in the concrete shall be of random sizes, capable of passing through a circular ring two inches in diameter and be free from detritus and dust, and the gravel shall be clean and of random
37 sizes, from that of a large pea to that of a pigeon's egg. The one and one-half inch layer of Neuchatel bituminous limestone shall be of the best quality for paving purposes, and shall be well and uniformly compacted, and possess a smooth and even surface, and shall be fully equal, in strength, hardness, toughness, and durability, to the best

Neuchatel bituminous limestone pavements laid and used in the city of London, England.

The said party of the second part further covenants and agrees to keep the whole of said pavement in good repair, without charge, for the term of three years from the time of the completion of the entire work, and to make said repairs, if any shall become necessary, at such times as the said party of the first part shall direct, and to restore the bituminous limestone covering to a minimum thickness of one inch and three-eighths, without charge, on all portions of said pavement where the thickness shall have been reduced to less than one inch and three-eighths at or before the expiration of said term of three years; but the said party of
38 the second part shall not be required to repair any injuries caused by tearing up any part of said pavement in order to repair, lay, or relay gas or water pipes, or sewers, or for other purposes.

The said party of the second part further covenants and agrees to provide and set a line of curb, of North River blue-stone of best quality, against the outer face of the outer stringers of the Washington and Georgetown railroad tracks, between Sixth street and the northwest gate of the Capitol grounds; the stones to be smooth on the upper surface and fit closely against the stringers and rails, and to have a true and full width of five inches, with a draft-line two inches deep on the outer face; a length of not less than two feet on the straight portions of the track, and one foot on the curve, and a depth of eight inches; and said curb-stones shall be close-jointed on the ends and shall be firmly set in cement-mortar on the concrete foundation, and said foundation shall extend down to the lower surface of the cross-ties of the railroad for a width of one foot along the stringers, and be firmly bonded to the rest of the pavement
39 foundation; and a joint of cement-mortar shall be placed under the curb-stones where they rest upon a cross-tie.

The party of the second part further covenants and agrees that all the pavement hereinbefore described shall be fully completed and ready for use on or before the 15th of Jan., 1877, and that no hydraulic concrete shall be laid when, in judgment of the party of the first part, the road-bed is not in a fit condition to receive it, or the weather is so cold as to injure the cement, or prevent or seriously retard its setting, and the bituminous limestone covering shall not be laid when the foundation is too wet or insufficiently hard to receive it.

The party of the second part further covenants and agrees to promptly remove all its material and rubbish from the street where the pavement is finished and before the same is paid for or opened to traffic.

The commission constituting the party of the first part, in consideration of the faithful performance of all and several of the foregoing cove-
40 nants and agreements by the party of the second part, covenants and agrees, for and in behalf of the United States, to pay to the party of the second part, by warrant or order on the Secretary of the Treasury, the sum of $3.78 for each and every superficial yard of pavement, and 70 cts. per linear foot of curbing, including its foundation along the railroad tracks, the same being constructed and completed by the said party of the second part in accordance with the terms of this agreement, and to the satisfaction of the party of the first part; said payments to be made from time to time, if funds be available for the purpose, as often as

five thousand superficial yards of said finished pavement are accepted by the party of the first part, reserving, however, such portions, not exceeding twenty per cent. on the contract price of said finished pavement, as the party of the first part shall deem proper. When the entire work shall have been completed in accordance with the conditions of this agreement, the reserved balance will, if funds be available, be paid over to the
41 party of the second part, in the manner hereinabove described, with the exception of ten per centum of the entire cost of the work, which will be retained, as provided in the second section of the act approved July 19, 1876, and invested in the bonds of the United States, the interest thereon being paid to the party of the second part.

It is further covenanted and agreed by and between the parties to this agreement that if the said party of the first part shall require a greater thickness of foundation than eight inches for any portion of said pavement, the party of the second part shall lay such additional thickness, and be paid therefor at the rate of twelve cents per superficial yard for each additional inch of thickness over and above the said eight inches.

It is further covenanted and agreed between the parties to this agreement that all the material used in said pavement shall be approved by the party of the first part.

It is further covenanted and agreed that the party of the first part reserves the right to annul this contract whenever, in their judg-
42 ment, the party of the second part shall fail to prosecute the work with due and proper diligence, or shall fail to use such materials or do the work in such manner as the party of the first part shall approve.

And it is further expressly understood and agreed that no claim whatever shall at any time be made upon the United States by the party of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished, under or by virtue of this contract, and not expressly required in writing by the party of the first part or their successors, the price and quantities thereof having been first agreed upon by the contracting parties.

And it is also further agreed by the party of the second part, as required by the fourteenth section of the act of Congress approved July 17, 1862, that neither this contract, nor any interest therein, shall be transferred to any other party or parties; and any such transfer shall
43 cause the annulment of the contract, as far as the United States are concerned.

No member of Congress, officer or agent of the government, or any person employed in the public service, shall be admitted to any share herein, or any benefit which may arise herefrom.

In witness whereof the undersigned have hereunto placed their hands and seals the day and date first above written.

44 *Exhibit C, with bill.—Proposal.*

WASHINGTON, *October* 16, 1876.

Commission for Repaving Pennsylvania Avenue:

GENTLEMEN: I propose to remove the wood pavement, correct the grade, and repave with the blocks removed the streets intersecting Penn-

sylvania avenue at their intersection, and to make said repavement conform to the new grades of Pennsylvania avenue in a thoroughly workmanlike manner, for twenty (20) cents per square yard.

Very respectfully, your obedient servant,

JOHN J. BURROWS.

WASHINGTON, *Oct.* 16, 1876.

Commission for Repaving Pennsylvania Avenue:

GENTLEMEN: I propose to remove the blue-stone pavement, to correct the grade, and repair with the stone removed the streets intersecting Pennsylvania avenue at their intersections, and to make said repavement conform to the new grades of Pennsylvania avenue, in a thoroughly
45 workmanlike manner, for thirty cents (30) per square yard.

Very respectfully, your obedient servant,

JOHN J. BURROWS.

NOVEMBER 9, 1872.

Commissioners for Repaving Pennsylvania Avenue:

GENTLEMEN: I propose to furnish all materials, excavate for and build 9-inch brick area walls on Pennsylvania avenue, for (30) cents per square foot of wall.

I also propose to furnish and lay the tile-pipe necessary to drain said areas, at the following prices:

For 3-inch tile-pipe, per foot	$0 20
For 4-inch tile-pipe, per foot	25
For 6-inch tile-pipe, per foot	35
For 3-inch bends, each	50
For 6-inch bends, each	1 15
For 6-inch branches	1 05

Very respectfully, your obedient servant,

JOHN J. BURROWS.

WASHINGTON, *Oct.* 2, 1876.

Commission for Repaving Pennsylvania Avenue:

46 GENTLEMEN: I propose to do the work necessary in changing or enlarging inlets to traps, relaying curbs, relaying sidewalks (brick), resetting manhole and stop-cock covers, &c., as directed by the engineer in charge of Pennsylvania avenue improvement, and to furnish sand, gravel, and brick where required, at the following prices:

For enlarging trap-inlets and jointing new covers	$5 50
For cutting new inlets	5 00
For new water-ways with flag-stone bottoms and tops, and brick sidewalks, linear foot	1 00
For closing old inlets with brick, each	1 25
For resetting curb, linear foot	10
For relaying sidewalk, square yard	12
For resetting trap-frames, each	4 00
For resetting iron manhole covers, each	2 00

For resetting stop-cock boxes (iron), each		2 00
For resetting stone manhole covers (2x4), each		4 00
For new paving-brick (prime cost delivered), per thousand		11 00
For new arch-brick (prime cost delivered), per thousand		8 00
For gravel for repaving, per square yard, 4 inches deep		08
For sand for repaving, per square yard, 3 inches deep		07
47 For hauling flag-stone from District property-yard, per square foot		02½

Very respectfully,

JOHN J. BURROWS.

48 *Exhibit D, with bill.—Final statement relating to the repaving of Penn'a avenue.—Filed July 9, 1877.*

The United States in account with Penn'a avenue, Dr.

For material furnished and pavement laid complete upon Penn. avenue, as follows, viz:		
" 78,521 $\frac{98}{100}$ superficial yards pavement laid complete, at $3.78 per sq. yd		$296,809 68
" 14,691 $\frac{16}{100}$ linear feet 5-inch curb set along street railway tracks, at 70c. per linear foot		10,283 81
" 1,991½ superficial yards hydraulic concrete laid 1 inch below 8-inch base, at 12c. per sq. yd		238 98
" 2,580 superficial yards bituminous concrete laid, at 25c. per sq. yd. additional price		645 00
" 407 $\frac{21}{100}$ superficial yards Neuchatel rock surface relaid (due to changed grade), at $2.86 per sq. yd		1,164 62
" 19 $\frac{9}{10}$ superficial yards Grahamite surface relaid (due to changed grade), at 2.58 per sq. yd		51 34
" underpinning 14,631 $\frac{82}{100}$ linear feet street railway tracks, at .0774½c. per ft		1,133 23
" dressing street curb north side of Penn'a ave. bet. 9th & 10th sts		25 00
Total of final estimates of Neuchatel & Grahamite contracts		$310,351 66
To which add amounts of vouchers drawn by commission, viz:		
For J. J. Burrows, Nov. 9 & Dec. 12, 1876, Mar. 24 & May 26, 1877		$2,318 04
" printing proposals and blanks (vouchers)		349 80
" pay-roll, superintendence, and engineering, inspection, &c		5,673 00
" traveling expenses of superintendent		32 93
" repairing steel tape, $4.00, & 1 new steel tape, $10.00		14 00
Total cost of pavement		$318,739 43

49 *Final statement showing total quantity of pavement laid on Penn'a ave., and the total cost of the same; also the quantities and value of the same chargeable to the several accounts.*

	Total pavement, sq. yds.	Total cost.
	78,521.08	$318,739 43

Chargeable as follows, viz:

	Sup'l yds.	Proportion of cost.
To street railway companies	3,905.76	15,854 59
" owners of private property	12,510.77	50,784 78
" the District of Columbia	25,394.25[5]	103,082 52
" the United States	36,710.29[5]	149,017 54
Total, as above	78,521.08	$318,739 43

Final distribution of quantities and cost, chargeable to—

	Sup'l yds.	Proportion of cost.
To the Capitol and N. O St. Railway & Co.	615.23[5]	$2,497 41
" the Metropolitan St. Railway Co	283.28	1,149 91
" " Washington & Georgetown Railway Co	3,007.24[7]	12,207 27
" private property, 7,795$\frac{64}{100}$ linear feet frontage	12,510.77	50,784 78
" the District of Columbia, 264$\frac{69}{100}$ linear feet frontage, market reservation	1,274.35	5,172 95
" proportion of avenue intersection & alleys	24,119.90[5]	97,909 57
" United States, being frontage of reservations, Treasury grounds, Botanical Garden, west grounds of the Capitol	12,590.39	51,107 98
" proportion of avenue intersection and alleys	24,119.90[5]	97,909 56
Total sq. yds	78,521.08	$318,739 43

H. G. WRIGHT, *Bvt. Maj. Gen'l U. S. A.*,
Q. A. GILLMORE, *Bvt. Maj. Gen'l U. S. A.*,
EDWARD CLARK,
Comm'rs.

50 *Exhibit E, with bill.—Filed July 9th*, 1877.

Notice is hereby given to the following-named railroad companies that the amounts chargeable respectively against them for the pavement of Pennsylvania avenue, under the act of Congress entitled "An act authorizing the repavement of Pennsylvania avenue," approved July 19, 1876, are as follows, to wit:

The Washington and Georgetown Railroad Company, nineteen thousand eight hundred and eighty-six dollars and sixty-nine cents ($19,886.69).

The Capitol, North O Street, and South Washington Railroad Company, two thousand eight hundred and twenty-eight dollars and eighty-five cents ($2,828.85).

Metropolitan Railroad Company, twelve hundred and seventy-five dollars and fifteen cents ($1,275.15).

Which sums we, the undersigned, acting under the authority conferred upon us in said law, do hereby assess upon said railroad companies respectively.

And we further give notice that if the aforesaid railroad com-
51 panies, or any of them, assessed as above, shall neglect or refuse, for the space of thirty days from the date of publication of this notice, to pay to the collector of the District of Columbia the amounts so assessed upon them respectively, we will, in pursuance of said law, issue certificates of indebtedness against the property so assessed; which certificates will bear interest at the rate of ten per centum per annum until paid, and which, until they are paid, will remain and be a lien upon the property on or against which they are issued.

W. DENNISON,
J. H. KETCHAM,
S. L. PHELPS,
Commissioners of the District of Columbia.

WASHINGTON, D. C., *June* 26, 1877.

(J'e 26.)

51½ The following is the indorsement on the back of the bill:

1877, July 9. The clerk will issue notice of application for injunction, returnable 16th inst.

(Signed) A. WYLIE.

52 In the supreme court of the District of Columbia.

THE WASHINGTON AND GEORGETOWN RAILroad Company *vs.* THE DISTRICT OF COLUMBIA.	No. 5673. Eq. doc. 17.

1877, JULY 9TH.—An application for injunction is this day filed by complainant. Hearing thereof is fixed for July 16, 1877, of which take notice.

By order of the court:

A. WYLIE,
Justice, &c.

Test:

R. J. MEIGS,
Clerk S. C. D. C.,
By R. J. MEIGS, JR.,
Asst. Clk.

53 *Subpœna to answer.*

In the supreme court of the District of Columbia the 9th day of July, 1877.

THE WASHINGTON AND GEORGETOWN RAILroad Company, complainant, *against* THE DISTRICT OF COLUMBIA, DEFENDANT.	No. 5673. Eq'y doc. 17.

The President of the United States to the District of Columbia, Wm. Dennison, Seth L. Phelps, Thos. B. Bryan, Comm'rs, &c., defendant':

You are hereby commanded to appear in this court at its first special term occurring twenty days after service of this subpœna, and answer the exigency of the bill this day filed and entitled as above, under pain of attachment and such other process of contempt as the court shall award.

Witness:

D. K. CARTTER,
Chief Jus.
R. J. MEIGS, *Clerk*,
By R. J. MEIGS, *Ass't Clerk.*

MEMORANDUM.—That the defendant herewith served is to enter its appearance in this suit in the clerk's office on or before the day at which this writ is returnable; otherwise the bill may be taken for confessed.

54 *Return of marshal.*

Service accepted for Commissioners D. C.
July 10, 1877.

A. A. BIRNEY,
Ass't Att'y D. C.

Sum'n'd and served notice of inj'n *ment* on defendant by acceptance of A. A. Birney, ass't att'y D. C.
July 10, 1877.

F. DOUGLASS, *Marshal.*

55 In the supreme court of the District of Columbia, July 16, 1877.

THE WASHINGTON AND GEORGETOWN RAILroad Company *vs.* THE DISTRICT OF COLUMBIA AND WILLIAM Dennison, Seth L. Phelps, and Thomas B. Bryan, Commissioners of the Dist. of Columbia.	Equity docket No. 5673.

Answer of defendants, the Commissioners of the District of Columbia.

These defendants, jointly and severally answering, say:

1st. We admit the capacity in which complainant sues and these defendants are sued, as set forth in the first paragraph of complainant's bill.

56 2d. We admit that the averments of paragraph 2 are substantially correct; but, for greater certainty, refer to the text itself of the act of July 19, 1876, referred to by complainant.

3d. We say that we are informed and believe that contracts of the general character averred were made between the parties named, but we have no knowledge whether the papers filed as Exhibit A and Exhibit B are copies of said contracts; and therefore neither deny nor admit the same.

4th. We say that we have no personal knowledge of the informal contract averred to have been made by the said paving commissioners with John J. Burrows, or whether the paper filed as Exhibit C is a copy of proposals made by the said Burrows and accepted by said paving commissioners; and we neither deny nor admit the same, but require that the complainant shall prove the same as alleged.

5th. We believe the statements made in the fifth paragraph of the bill are true, except that there was fraud in paving Pennsylvania avenue, under the law of 1870, upon the tax-payers of the District and upon complainant and other property holders, of which allegation we know nothing; nor do we know whether the cobble-stone pavement between the exterior tracks of complainant's railroad was in good condition and a substantial and permanent pavement, but we leave complainant to prove its averments in that regard.

6th. We admit that the complainant conformed to the grade laid down by the paving commission and took up the cobble-stone pavement between its tracks and paved the said space with Belgian rock, in obedience to the direction of the said paving commission, but we submit that the averments in this paragraph are irrelevant and immaterial, as said action on the part of complainant was required by law.

57 7th. We deny that said paving commission unlawfully assumed the authority to place along the outer side of the exterior rails of complainant's railroad the blue-stone curb mentioned in said paragraph, but say that said commissioners had full authority by law to place said curb. We deny that said curb was elaborately dressed and of a very expensive quality and finish; we deny also that the said line of curb is of no benefit whatever to the complainant's road, and that it forms no part of the pavement so selected, and that it was not necessary in the construction of the said pavement, and that an undressed curb would have been much better than the said dressed stone, but we say that the said stone curb benefits the complainant's road by affording a smooth and solid surface for the action of the car-wheels, particularly when the cars are from any cause thrown from the iron track; that the said curb was necessary for the protection of the carriage-way from the action of the car-wheels, and that such a protection was an essential finish to said carriage-way, protecting it from gradual destruction at its line of connection with the exterior line of the iron track of the railroad company, and that undressed stone would not have been suitable as the finish of a carriage-way intended to be perfectly smooth.

We admit that complainant was not consulted in regard to this line of curb-stone, and that no information as to the exact cost of dressing the same was communicated to its officers; and that said officers were informed by said paving commissioners, or some of them, that said curbing would be charged in the general cost of the entire work and would not be a separate burthen upon said complainant, but we say that said paving com-

mission was not required by law to consult complainant on this subject, but was given exclusive discretion to determine the best kind of pavement to be used. We say further, that the officers, agents, and employés of said complainant had full knowledge that said blue-stone curbing was being laid from the time it was begun to be laid; that they saw the said curb while it was being laid, and that, as we believe, they made no opposition to the laying of said curb, but acquiesced in the same until the pave-
58 ment was completed; and that the objection of complainant and its officers to said curb of dressed blue-stone dates from the time when they were informed that the cost of said curb would be included in the assessment against said complainant; and we submit that the paving commission, not having been intrusted by law with the power of assessment, were not authorized to give any assurance to complainant that the assessment for said curbing should not be made against complainant, but that the duty to make such assessment was by law imposed upon the Commissioners of the District of Columbia, the said curbing being within the limits of two feet from and exterior to the tracks of the road of said complainant and on each side of said outer line of railroad tracks. And these defendants further say that if the complainant had been assessed for the cost of two feet of asphalt pavement on the outside of the exterior line of the outside tracks of their road, counting the curb as a part of said pavement, and at the average cost thereof, the assessment against complainant would be $ that instead of so assessing against plaintiff these defendants have assessed the actual cost of the five-inch curb and nineteen inchs of asphalt, amounting to $; that the actual difference between the amounts assessed on these two principles would be $.

And we believe that complainant has heretofore claimed that it should not be assessed at all for the curb, and should be assessed for only nineteen inches of the asphalt part of the pavement on the outside of the exterior line of its outer track.

8th. We submit that the complainant has not, in the eighth paragraph, shown any case in equity, and we pray all such benefit as if we had demurred to the said paragraph on the ground of its omission to aver that said Burrows did any work under his alleged contract which it was not lawful and right for the paving commission to cause to be done.

In regard to the facts, we say that, as incidental to the pavement
59 of Pennsylvania avenue, including the lowering of its grade, it was necessary, for the purpose of letting off the water at the corners of the streets, to lower the sewer openings, commonly called manholes; that these sewer openings were each covered with a heavy iron or stone plate, and that this being lowered, the abutting bricks of the sidewalk were left on a higher grade and were necessarily reset, the curb-stones also being deprived of the support of the earth on the carriage-way side by the lowering of the avenue grade, were loosened and liable to fall into the avenue. It was necessary to reset them. This and similar work was done by the paving commission as strictly incidental to their main work. We believe that a large portion of the work alleged to have been done by Burrows was done in lowering these sewer openings at the street corners so as to take off the water from the whole avenue.

This work was quite as necessary to the discharge of the water from the

two feet next the railroad track as from any other portion of the carriage-way, and the expense of it would seem to be, like the expense of superintendence, properly chargeable in the aggregate cost of the entire carriage-way, but we deny that the expense of this, or of any part thereof, was assessed to complainant, or that it forms any part of the $19,886.69 assessed against complainant.

9th. We admit the facts alleged in the ninth paragraph, but we submit that the power of grading the avenue was vested by law in said paving commission; that said power was continuous and not exhausted by any one exercise of it, and that the work of underpinning the tracks of the complainant's road was one, the expense of which was properly chargeable to said complainant.

10th. We admit the reception by us of a paper communicated by the paving commissioners of Pennsylvania avenue, a copy of which, marked Exhibit D, is filed as a part of complainant's bill, and we say that on our request the said paving commissioners also communicated to us full statements in detail of all the expenditures of such pavement of
60 Pennsylvania avenue, and that we used said paper and said statements for the purposes of a faithful performance of our duty under the aforesaid act of July 19, 1876, and that these defendants, William Dennison and Seth L. Phelps, together with John H. Ketcham, who was, at that time, one of said Commissioners of said District, did faithfully, and to the best of their knowledge and ability, perform the duty of assessment imposed upon them; that in the performance of that duty they were necessarily bound by the terms of the law, and did not regard anything in the nature of an assessment suggested in the paper communicated to them, and that they proceeded to assess as required by law in the words and figures of the paper herewith filed, marked "Defendant's Exhibit A," and which we pray may be taken as part of this answer. We deny that it is our intention to issue more than one certificate under said assessment against complainant's property, and we submit that our notification of assessment cannot be properly so construed. We admit that Exhibit E is a true copy of the notification published by said defendants, William Dennison, Seth L. Phelps, and their co-Commissioner, John H. Ketcham.

We submit that there is a discrepancy in the statements made in said paragraph 10 of complainant's bill, one statement being in effect that the assessment against complainant is composed of four items, namely, yards of pavement, linear feet of curb, underpinning, and incidentals, amounting in all to $19,886.69, which is the true sum assessed against complainant; the other and repugnant statement being that in our assessment is also charged the pro rata share of the expense for resetting the curb, grading and repairing the footway under the agreement with John J. Burrows, this charge being in addition to the four others above named, which statement is denied in the answer. We deny, also, that said complainant will be irreparably injured by the issue of said tax-lien certificates or by any act connected therewith except its own failure to pay an assessment properly made against it under a law of Congress. We
61 also deny that to establish the facts necessary to be established to inform the court fully in regard to this matter it will be necessary to produce before this court extrinsic evidence not contained in the record, and say that all such facts are to be found in the statement contained in

Complainants' Exhibit D, in the statements made by the paving commission of its expenditures in regard to the pavement, and in the assessment made by the Commissioners of the District of Columbia.

11th. We are strangers to all and singular the facts set forth in the eleventh paragraph, and therefore neither deny or admit the same, but leave the complainant to bring such proof of the same as it may be able to produce, and we submit that under the Constitution of the United States Congress has the right to grade and regrade, pave and repave, the said Pennsylvania avenue, and to affix whatever conditions it may choose to its grant to complainants to build a railroad track on said avenue for the exclusive benefit of complainant, and we deny that complainant has any right whatever, aside from the grant by Congress, to use said Pennsylvania avenue for its railroad tracks.

12th. We deny the averments contained in the twelfth paragraph, or so much thereof as we are advised is material in this cause.

13th. We note the averment by complainant in the thirteenth paragraph of its bill of its readiness to bring into court the sum of $12,207.27, and its offer to bring the said sum into court to be disposed of according to the order of the court, and inasmuch as said money should be paid at once to the contractors, to whom it is due, we accept said offer and pray that the court may at once make its order that complainant shall forthwith pay said sum to the collector of taxes for the District of Columbia to be disposed of by him in compliance with the requirements of law, but we deny that there is no legal obligation resting upon complainant to pay the said sum, but we say that said complainant is under
62 legal obligation to pay the entire sum assessed upon it as aforesaid, and we decline the compromise suggested by complainant, not having been authorized and empowered by law to make said compromise.

14th. We deny all the matters and things set forth in the fourteenth paragraph of complainant's bill, and say that the material statements in said paragraph are inaccurate and imperfect; and we say that the law of July 19, 1876, does not anywhere provide expressly or by implication that complainant is to be charged for its part of the pavement on Pennsylvania avenue an equal price with other persons who are charged with assessments for said pavement.

We deny that the expense of said curb-stone alone, assessed against complainant, exceeds the total expense of all its portion of the pavement assessable under the law to complainant, and we say that the portion of the pavement assessable against complainant and lying outside of the extension of its outer tracks is two feet in width, which two feet are composed of five inches of blue-stone, and nineteen inches of concrete, including its base, and that the cost of said stone curb is only $9,476.59, and that the cost of the rest of the pavement assessable to complainant is $10,410.10.

And we further say that section 5 of the law provides that the cost of laying down said pavement, exclusive of the work charged to and paid for by said complainant, shall not exceed the sum of four dollars and thirty cents per square yard, but there is no provision in said law that the cost assessable to complainant for its portion of said pavement shall not amount to more than $4.30, or even $6.61 per square yard, and we say that the provisions of said law in regard to the cost of said pavement, are, to the best of our knowledge and belief, strictly observed.

15th. We admit that it is our intention to issue a certificate of indebtedness against the property of complainant as provided for in the
63 sixth section of the aforesaid act of July 19, 1876, in the contingency mentioned in said section, which issue is a duty imposed upon us by law, but we deny that the effect of the issue of said certificate will be to involve complainant in a multiplicity of suits, and we deny that said complainant will suffer irremediable injury and mischief or be put to great and needless expense except as the result of its own refusal and neglect to make the payment required by law.

16th. We admit that a portion of the expense of the said pavement has been assessed upon many other owners of property abutting upon said pavement of Pennsylvania avenue, and we say that the names of all such persons so assessed, are, to the best of our knowledge and belief, properly set forth in defendants' Exhibit A, which is part of this answer, and we say that such persons are not, under the terms of said law of July 19, 1876, assessable for any portion of the expense of the blue-stone curb aforesaid, which curb is not placed within the limits of the part of the pavement assessable to said property owners, and we say that if the cost of said curb has not been assessed to complainant it cannot be assessed under said law upon any other person or persons whomsoever.

And these defendants, resisting the prayer of complainant for the writ of injunction and the prayer for other and further relief in the premises, and saving and reserving to themselves all the right and benefit of exception to the many imperfections contained in said bill, and denying that said complainant has made out any case for the intervention and assistance of a court of equity, and having fully answered all the material averments in said bill, pray to be hence dismissed with their costs in this behalf most wrongfully sustained.

S. L. PHELPS,
THOS. B. BRYAN,
Commissioners D. C.

64 DISTRICT OF COLUMBIA, *ss:*

Seth L. Phelps, being first duly sworn in the above cause, deposes and on oath says that he is Commissioner for the District of Columbia, and defendant in this cause; that he has read and heard read the foregoing answer by him subscribed, and knows the contents thereof; that the facts therein stated upon personal knowledge are true, and those stated upon information and belief they believe to be true.

S. L. PHELPS.
THOS. B. BRYAN.

Sworn to and subscribed before me this 16th day of July, 1877.
[SEAL.] W. TINDALL, *J. P.*

In the supreme court of the District of Columbia.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY
vs.
THE DISTRICT OF COLUMBIA ET AL. } No. 5673. Equity.

The separate answer of the above-named defendant, the District of Columbia, to the bill of complaint in this cause respectfully shows:

1st. It admits that it is a municipal corporation with limited powers, capable of suing and being sued, and that the plaintiff is a corporation as alleged.

2d. It further says that it has no interest whatever in the subject-matter of this suit except as one of the corporations required by the said act of Congress approved July 19, 1876, to pay a part of the cost of lay-
65 ing down the pavement on said Pennsylvania avenue, by said act provided for; that said pavement has been fully completed; that of the whole cost thereof, to wit, $318,739.43, the sum of $100,291.04 was assessed by the Commissioners of the District of Columbia, as provided in said act, against the defendant, as its proportion of said cost; that this defendant has fully paid and satisfied the said assessment, and is not concerned or interested in the assessment complained of by the plaintiff.

And now having fully answered to so much of the bill of complaint as it is advised is necessary or material for it to answer, this defendant prays to be hence dismissed with its costs in this behalf unreasonably incurred.

And said defendant corporation has caused this its answer to be signed and its seal to be affixed hereto by the Commissioners of said District of Columbia appointed by virtue of an act of Congress approved June 20, 1874, entitled "An act to provide a government for the District of Columbia, and for other purposes," this 16th day of June, 1877.

S. L. PHELPS,
THOS. B. BRYAN,
Commissioners D. C.

BIRNEY & BIRNEY,
Counsel for Defendant.

66 *Pennsylvania ave. pavement.—Assessment notice.*

OFFICE OF THE COMMISSIONERS OF THE
DISTRICT OF COLUMBIA,
Washington, June 26, 1877.

Whereas H. G. Wright and Q. A. Gillmore, of the Engineer Corps of the Army, and Edward Clark, of Washington City, forming a commission appointed by the act of the Congress of the United States, entitled "An act authorizing the repavement of Pennsylvania avenue," approved July 19, 1876, have reported that they have fully performed the duties imposed upon them by said act, and have caused Pennsylvania avenue, in Washington, District of Columbia, to be paved from the northwest gate of the Capitol grounds to and including the crossing of 15th street west, in the manner provided for in said act, and that such pavement has been completed to their satisfaction at a total cost of $318,739.43;

And whereas it is by the third section of said act of Congress
67 provided that the cost of laying down said pavement shall be paid for in the following proportion and manner: The Washington and Georgetown Railroad Company shall bear all the expense for that portion of the work lying between the exterior rails of the tracks of the road and for a distance of two (2) feet from and exterior to the track on each side thereof;

And whereas by the seventh section of said act it is provided that when street railroads cross Pennsylvania avenue the pavement between

their tracks shall conform to the kind of pavement used on the said avenue, and the companies owning these intersecting railroads shall pay for paving the same in the same manner and proportion as is required by section 3 of the Washington and Georgetown Railroad Company;

And whereas by the third section of said act it is provided that the United States shall pay the cost of paving the spaces between its
68 property and the part of the avenue to be paid for by said Washington and Georgetown Railroad Company, and one-half of the cost of paving the intersections of the streets and avenues, less that to be paid by the said railroad companies, and the other half shall be paid out of the revenues of the Dist. of Co., and the residue of the cost of such paving shall be paid as follows: One-third by the owners of private property lying and abutting on said Pennsylvania avenue, in proportion to their frontage thereon; one-third by the United States, and one-third out of the general revenues of the District of Columbia;

And whereas it is further provided by said act that the property owners of such parts of squares 254, 256, 323, 348, 408, as are abutting upon said pavement shall be assessed at the same rate per front foot as the owners on Penn. avenue, and also that the space between 7th and 8th streets opposite the locality now occupied by the Washington Market Company shall be paid by the Dist. of Co.;

And whereas it is further provided by said act that assessments
69 shall be made by the Commissioners of the District of Columbia upon the owners of said private property on said avenue and squares, and upon said railroad companies respectively, and upon the sums so found, collected by the collector of the Dist. of Columbia;

And whereas of the total cost of said pavement as reported by the said commission, to wit, $318,739.43, we find that the sum of $19,886.69 was the whole expense for that portion of the work lying between the exterior rails of the tracks of the road of the Washington and Georgetown Railroad Company and for a distance of two (2) feet from and exterior to the track on each side thereof; and that the further sum $2,828.85 was the whole expense for that portion of the work lying between the exterior rails of the tracks of the road of the Capitol, North O Street and South Washington Railroad Company (which company is the owner of a railroad intersecting Penn. avenue at 14th street west and at 1st street west), and for a distance of two (2) feet from and exterior to the track on
70 each side thereof; and that the further sum $1,275.15 was the whole expense for that portion of the work lying between the exterior rails of the tracks of the road of the Metropolitan Railroad Company (which company is the owner of a railroad intersecting Penn. avenue at 9th street west) and for a distance of two feet from and exterior to the track on each side thereof; and that the further sum of $49,754.91 was the cost of paving the space between the property of the United States and the part of the ave. to be paid for by said Washington and Georgetown Railroad Company; and that the further sum $5,036.82 was the cost of the pavement between 7th and 8th sts., opposite the locality now occupied by the Washington Market Company; and that the further sum of $91,611.30 was the whole cost of paving the intersections of the streets and avenues, less that to be paid by the said railroad companies, which said last-mentioned sum is to be paid in equal parts by the United States

and by the District of Columbia; and the further sum of
71 $148,345.71 was the residue of the cost of such paving:

Now, therefore, this is to give notice that we, the undersigned, Commissioners of the District of Columbia, acting by authority of the said act of the Congress of the United States, have this day assessed, and do hereby assess, upon the said Washington and Georgetown Railroad Company, the Capitol, North O Street and South Washington Railway Company, and upon the Metropolitan Railroad Company the aforesaid sums respectively found to be the cost of the pavement chargeable to them respectively under the said law of Congress, and that we do hereby assess upon the owners of private property lying and abutting upon said Pennsylvania avenue and upon the property owners of such parts of squares 254, 256, 323, 348, 408 as are abutting upon said pavement the sum of $49,448.47, being the third of the residue aforesaid and the amount chargeable under the law to said private property owners, and that we have apportioned the said assessment in proportion to frontage
72 upon said pavement among said owners as follows:

Rate of assessment, $6.343106 *per front foot.*

SQUARE 225.

Lot 1: front feet, 86; $545.51; assessed to Joseph C. & H. A. Willard.

Lot 2: front feet, 53.5; $338.83; assessed to Joseph C. & H. A. Willard.

Of 3: front feet, e. 26.8; $169.15; assessed to Ruth Carberry.

Of 3: front feet, w. 26.8; $169.15; assessed to Samuel W. Owen.

Lot 4: front feet, 53.4; $338.30; assessed to Joseph C. Willard.

Lot 5: front feet, 53.5; $338.83; assessed to Joseph C. Willard.

Of 6: front feet, e. 27; $171.26; assessed to M. F. and C. H. Cragin, jr.

Of 6: front feet, w. 51.2; $324.55; assessed to Wm. W. Corcoran.

SQUARE 226.

S. H Y: front feet, 30; $190.29; assessed to Henry K. Randall.

S. I on: front feet, 20; $126.86; assessed to Henry K. Randall.

S. a: front feet, 26.2; $165.98; assessed to Henry K. Randall.

S. b: front feet, 25; $158.58; assessed to Henry K. Randall.

73 S. c: front feet, 25; $158.58; assessed to Henry K. Randall, trustee.

S. d: front feet, 23.5; $148.53; assessed to W. B. Webb and M. V. Z. Woodhull.

S. M'z: front feet, 25; $158.58; assessed to W. B. Webb & M. V. Z. Woodhull.

S. B't: front feet, 25; $158.58; assessed to Geo. G. Cornwell.

S. K: front feet, 25; $158.58; assessed to Mary Gunton Temple.

S. Bux.: front feet, 25; $158.58; assessed to Thomas Cookendorfer.

S. B'n: front feet, 25; $158.58; assessed to Maxwell V. Z. Woodhull.

S. e: front feet, 25; $158.58; assessed to Maxwell V. Z. Woodhull.

Of s. f: front feet, w. 17.3; $109.42; assessed to J. Forbes Beale.

Of s. f: front feet, e. 7.9; $49.16; assessed to D. W. Middleton.
S. g: front feet, 25; $158.58; assessed to D. W. Middleton.
Of s. h: front feet, w. 21.7½; $137.17; assessed to Sisters of the Visitation, Georgetown.
Of s. h: front feet, e. 3.4½; $21.40; assessed to A. R. Frazer.
74 S. i: front feet, 18.1; $114.70; assessed to A. R. Frazer.

SQUARE 254.

Of 9: front feet, w. 32.4; $205.09; assessed to Joseph C. Willard.
Of 9: front feet, 25.2; $159.63; assessed to Wm. B. Love, trust. C. A. Kidwell.
Of 9: front feet, e. 2.11¼; $18.63; assessed to Wm. J. Stone, jr., (heirs).
Of 8: front feet, w. 25; $158.58; assessed to Wm. J. Stone, jr., (heirs).
Of 8: front feet, e. 24.11¾; $158.45; assessed to Henry A. Willard.
Of 7: front feet, w. 40.5¼; $256.50; assessed to Henry A. Willard.
Of 7: front feet, e. 20; $126.86; assessed to Chas. G. Ball.
Of 6: front feet, w. 23.2¼; $147.08; assessed to Francis Miller, trustee Julia Blake.
Of 6: front feet, 29.6½; $187.39; assessed to Wm. Shoomaker.

SQUARE 256.

S. 15: front feet, 24; $152.24; assessed to Timothy Toumey.
S. 16: front feet, 16.2; $102.55; assessed to Timothy Toumey.
75 S. 17: front feet, 16.2; $102.55; assessed to Henry Birch.
S. 18; front feet, 16.2; $102.55; assessed to Wm. Fletcher.
Of 9: front feet, e. 24.2; $153.29; assessed to Alex. Rutherford.
Of 10: front feet, w. 24.2½; $153.55; assessed to S. A. Prentiss.
Of 10: front feet, e. 24.2½; $153.55; assessed to John F. Bridgett.
Of 11: front feet, w. 24.2; $153.29; assessed to Benj. F. Lloyed.
Of 11: front feet, e. 24.2; $153.29; assessed to B. F. Lloyd, trustee C. Murtagh.
Lot 12: front feet, 48.4; $306.58; assessed to Wm. J. Murtagh.

SQUARE 291.

Of 1: front feet, e. 34; $213.67; assessed to Philip K. Reily.
Of 1: front feet, 20; $126.86; assessed to John France.
Of 1: front feet, 25; $158.58; assessed to Robt. K. Stone (heirs).
Of 1: front feet, 17.6; $111.00; assessed to Elizabeth J. Stone.
Of 1: front feet, w. 17.6; $111.00; assessed to Mary K. Lenthall.
76 Lot 2: front feet, 55; $348.87; assessed to Elias Travers.
Of 3: front feet, e. 5; $31.72; assessed to Elias Travers.
Of 3: front feet, w. 50; $317.15; assessed to Jas. Travers.
Of 4: front feet, e. 25.1; $159.11; assessed to Jas. Travers.
Of 4: front feet, w. 29.11; $189.77; assessed to Jos. Travers.
Lot 5: front feet, 82; $529.13; assessed to Jos. Travers.

SQUARE 292.

Of 1: front feet, e. 21.11½; $139.28; assessed to August Le Preux.
Of 1: front feet, 21.11½; $139.28; assessed to August Le Preux.
Of 1: front feet 21.11½; $139.28; assessed to Wm. J. Stone, jr. (heirs).
S. 5: front feet, 25.9; $163.33; assessed to Jos. B. Varnum.
S. 6: front feet, 22.8½; $144.04; assessed to Mary B. Hill.
Of 1: front feet, w. 6.7; $41.76; assessed to John France.
Of 2: front feet, e. 15.6¾; $98.72; assessed to John France.
Of 2: front feet, 15.6¾; $98.72; assessed to C. L. and Robt. Coltman.
Of 2: front feet, w. 31.1½; $197.43; assessed to Jas. McColgan.
77 S. A: front feet, 16.0¼; $101.62; assessed to Geo. W. Bonnell.
S. B: front feet, 16.1½; $102.28; assessed to Jane Farnham.
S. C: front feet, 15.0¾; $95.54; assessed to Jane Farnham.
Of 3: front feet, w. 23.7½; $149.86; assessed to Curtis B. Graham.
Of 4: front feet, e. 22.11; $145.36; assessed to Abraham H. Herr.
Of 4: front feet, 24.3; $153.82; assessed to Andrew Hancock.
Of 4: front feet, 23.7; $149.60; assessed to John Walter, jr., trustee John Walter, sr.
Of 4: front feet, w. 36.3; $229.94; assessed to John F. Betz.

SQUARE 322.

S. D: front feet, 21.2½; $134.53; assessed to Alex. R. Sheperd.
S. C: front feet, 25.3; $160.16; assessed to Alex. R. Sheperd.
S. B: front feet, 25.3½; $160.43; assessed to Robt. K. Stone (heirs).
S. A: front feet, 25.3; $160.16; assessed to Francis A. Lutz.
Of 1: front feet, w. 32; $202.98; assessed to Geo. F. Schaefer.
78 Of 1: front feet, 31.8; $200.87; assessed to M. W. Galt & Bro.
Of 1: front feet, 15.10; $100.43; assessed to Jos. Shellington.
Of 1: front feet, 15.10; 100.43; assessed to Fred. Pilling.
Of 1: front feet, e. 20; $126.86; assessed John J. Johnson.

SQUARE 323.

Of 8: front feet, w. 24; $152.23; assessed to G. A. W. Randall.
Of 8: front feet, 16; $101.49; assessed to Thos. Lewis.
Of 8: front feet, e. 10; $63.43; assessed to John W. Allen.
Of 9: front feet, w. 10.1; $63.96; assessed to John W. Allen.
Of 9: front feet, 20; $126.86; assessed to Geo. L. Sheriff.
Of 9: front feet, e. 20; $126.86; assessed to Wm. Grupe.
Lot 10: front feet, 50.1; $317.68; assessed to Wm. Stone Abert.
Lot 11: front feet, 50; $317.16; assessed to Elizabeth J. Stone.

SQUARE 348.

Of 1: front e. 30.2; $191.35; assessed to John Moore.
79 Of 1: front feet w. 19.10; $125.80; assessed to Geo. Savage.
Of 2: front feet e. 25.0½; $158.84; assessed to Wm. B. Kibbey.
Of 2: front feet, w. 25.0½; $158.84; assessed to Wm. B. Kibbey.
Of 3: front feet, e. 29.1; $184.48; assessed to Wm. B. Kibbey.

Of 3: front feet, w. 21; $133.20; assessed to Wm. B. Kibbey.
Of 4: front feet, e. 25; $158.58; assessed to Wm. Orme.
Of 4: front feet, w. 25; $158.58; assessed to Walter S. Cox.

SQUARE 349.

Of 6: front feet, w. 28; $177.60; assessed to Thos. M. Harvey.
Of 6: front feet, 24; $152.23; assessed to Jno. W. Thompson.
Of 6: front feet, 40.6; $256.89; assessed to Louis H. Schneider.
Of 6: front feet, e. 23; $145.89; assessed to Jno. W. Thompson.
S. D: front feet, 25; $158.58; assessed to Columbus Alexander.
S. C: front feet, 25; $158.58; assessed to Jno. Hitz & others, trust.
80 S. B: front feet, 25; $158.58; assessed to Henry DeCamp.
S. A: front feet, 21.6; $136.38; assessed to Mary Ann Harvey & others.

SQUARE 379.

S. 50: front feet, 51.0½; $323.76; assessed to Wm. Gunton.
Of 1: front feet, 23.2½; $147.21; assessed to Jno. Markriter.
Of 1: front feet. w. 23.3; $147.47; assessed to Stephen P. Franklin.
Of 2: front feet, e. 29.3; $186.53; assessed to Jas. C. Hall.
Of 2: front feet, 22; $139.54; assessed to Robt. S. Patterson.
Of 2: front feet, w. 14.9; 93.56; assessed to Joseph Bryan.
Of 3: front feet, e. 26; $164.92; assessed to E. Lindsley.
Of 3: front feet, 24; $152.23; assessed to Francis Masi.
Of 3: front feet, w. 23; $145.89; assessed to Wm. Wall.
Lot 4: front feet, 47.2; $299.18; assessed to Michael Shanks.
Lot 5: front feet, 47.2; $299.18; assessed to Elias Travers & others.
Of 6: front feet, e. 23.7; $149.59; assessed to Elizabeth Cropley
81 Of 6: front feet, w. 23.7; $149.59; assessed to Jno. C. McElden.
Of 7: front feet, e. 23.7; $149.59; assessed to Jno. F. Ellis.
Of 7: front feet, w. 23.7; $149.59; assessed to Annie E. May.
S. 54: front feet, 19.33; $122.61; assessed to Mary B. Hill.
S. 55: front feet, 18.36; $116.45; assessed to Mary B. Hill.
S. 56: front feet, 56.56; $358.76; assessed to Joseph B. Varnum.

SQUARE 380.

Of 1: front feet, e. 47.2; $299.18; assessed to Mutual Fire Ins. Co.
Of 1: front feet, 27.8; $175.59; assessed to Theodore Wheeler.
Of 1: front feet, 27.5¾; $174.30; assessed to Julia Keep.
Of 1: front feet, w. 0.2¼; $1.19; assessed to Columbia Bank Note Co.
S. A: front feet, 20; $126.80; assessed to Columbia Bank Note Co.
S. B: front feet, 23.4; $148.00; assessed to Columbia Bank Note Co.
S. C: front feet, 23.9; $150.65; assessed to Anthony & A. M. Buchley.
82 S. D: front feet, 23.1½; $146.68; assessed to Alex. R. Shepherd.
S. E: front feet, 23.1½; $146.68; assessed to Ann M. & H. Kerr.
S. F: front feet, 23.1½; $146.68; assessed to Ann M. & H. Kerr.
S. G: front feet, 23.1½; $146.68; assessed to Robt. S. Patterson.

Of 6: front feet, e. 20; $126.86; assessed to Thos. McGill, trust.
Of 6: front feet, 19.10; $125.81; assessed to Wm. Noell.
Of 6: front feet, 39.10; $252.67; assessed to Michael R. Coombs.
Of 6: front feet, 22; 139.55; assessed to Wm. H. Ward and Wm. B. Webb, trustees.
Of 6: front feet, w. 22.10; $144.83; assessed to Wm. H. Ward & Wm. B. Webb, trustees.

SQUARE 408.

Of 1: front feet, e. 25; $158.58; assessed to Lucy A. Wheeler.
Of 1: front feet, w. 25; $158.58; assessed to Angelica Simpson.
Of 2: front feet, e. 25; $158.58; assessed to Thos. L. Hume.
Of 2: front feet, w. 25; $158.58; assessed to Catharine A. Whalen.
Of 3: front feet, e. 25; $158.57; assessed to Wm. B. Kibbey.
83 Of 3: front feet, w. 25; $158.58; assessed to Thos. Connelly, of John.
S. A: front feet, 25; $158.57; assessed to Wm. H. Clagett.
S. B: front feet, 25; $158.58; assessed to A. E. & T. J. S. Perry.

SQUARE 460.

S. A: front feet, 18.9; $118.93; assessed to Samuel Caughey & J. N. Winston.
S. B: front feet, 18.9; $118.93; assessed to Samuel Caughey & J. N. Winston.
S. C: front feet, 18.9; $118.93; assessed to Jas. T. and Henry B. Castleman.
Of 1: front feet, w. 56.3; $356.80; assessed to Marshall Brown.
Lot 2: front feet, 51.6; $326.66; assessed to Marshall Brown.
Of 3: front feet, e. 31.11; $202.47; assessed to Marshall Brown.
S. N: front feet, 21.98; $139.42; assessed to Matthew G. Stevens.
S. L: front feet, 21.98; $139.42; assessed to Jas. Y. Davis.
Of 4: front feet, w. 27.11½; $177.35; assessed to M. W. & W. Galt.
Of 5: front feet, e. 22; $139.55; assessed to W. H. Ward.
84 Of 5: front feet, 21.6; $136.38; assessed to Z. D. Gilman.
Of 5: front feet, 15.4; $97.26; assessed to Henry Janney.
Of 5: front feet, w. 45; $285.44; Jno. R. Murray & Jno. H. Semmes.

SQUARE 461.

S. 1: front feet, 23.5; $148.53; assessed to Hugh Gelaton.
S. 2: front feet, 22; $139.55; assessed to Jno. Moore.
S. 3: front feet, 10; $63.43; assessed to Michael R. Coombs.
S. 4: front feet, 12; $76.12; assessed to Michael R. Coombs.
S. 5: front feet, 24; $152.24; assessed to Wm. H. Campbell.
Of s. 6: front feet, 22; $139.55; assessed to Joseph B. Bryan.
S. 7: front feet, 22; $139.55; assessed to Wm. B. Todd & H. Proboson, trust A. Duncanson.
Of 2: front feet, e. 20; $126.86; assessed to Thos. Parker.
Of 2: front feet, w. 39.9; $252.14; assessed to Ann S. Parker.
Of 3: front feet, e. 3.3; $20.61; assessed to Ann S. Parker.
85 S. 56: front feet, 26.7½; $168.88; assessed to Jno. E. Kendall.

S. 58: front feet, 29.10½; $189.53; assessed to Benj. F. Wade.
S. 53: front feet, 30; $190.29; assessed to W. B. Todd & B. L. Jackson, trust.
S. 52: front feet, 23.9; $150.64; assessed to W. B. Todd & B. L. Jackson, trust.
S. 54: front feet, 22; $139.54; assessed to V. L. & W. B. Jackson.
Of 5: front feet, 22; $139.54; assessed to Jacob Karr.
Of 5: front feet, w. 22; $139.55; assessed to Rob't Cohen.
S. 12: front feet, 24.3; $153.82; assessed to Nicholas H. Shea.
S. 11: front feet, 24.3; $153.82; assessed to Andrew Coyle.
S. 10: front feet, 24.2; $153.29; assessed to Wm. Egan.
S. 9: front feet, 24.2; $153.29; assessed to Marion B. Thompson.
Of s 8: front feet, 37.7; $238.40; assessed to Samuel and Peter F. Bacon.

SQUARE 491.

Of 1: front feet, e. 55.7; $352.57; assessed to Geo. Beale.
86 Of 1: front feet, 18; $114.18; assessed to Emily Beale.
Of 1: front feet, 18.4½; $116.56; assessed to Benj. H. Duvall.
Of 1: front feet, w. 18.4½; $116.56; assessed to Annie Duvall & others.
Of 2: front feet, e. 29.6½; $187.39; assessed to Wm. J. Stone, jr. (heirs).
Of 2: front feet, 14.9¼; $93.69; assessed to Wm. B. Kibbey.
Of 2: front feet, w. 14.9¼; $93.69; assessed to Henry Scherf.
Of 3: front feet, e. 18; $114.18; assessed to Edward Lacey.
Of 3: front feet, 16; $101.49; assessed to Jno. M. Johnson.
Of 3: front feet, w. 22.11; $145.36; assessed to Wm. H. Morrison.
S. A: front feet, 27½; $175.23; assessed to Dan'l B. Clark.
Of 4: front feet, 13.9¾; $87.59; assessed to Henry Kraak.
Of 4: front feet, w. 13.9¾; $87.60; assessed to Henry Kraak.
Of 5: front feet, e. 27.7½; $175.23; assessed to Jos. Hoban.
Of 5: front feet, w. 27.7½; $175.23; assessed to Frank Taylor.
87 Of 6: front feet, e. 19.4; $122.64; assessed to Caroline Kaufman.
Of 6: front feet, 19.4; $122.64; assessed to Francis A. Lutz.
Of 6: front feet, w. 19.4; $122.64; assessed to Horace S. Johnson.
Of 7: front feet, e. 19; $120.52; assessed to Francis A. Lutz.
Of 7: front feet, 19; $120.52; assessed to Francis A. Lutz.
Of 7: front feet, w. 20; $126.86; assessed to National Hotel Co.
Lot 8: front feet, 58; $367.90; assessed to National Hotel Co.
Lot 9: front feet, 71.8; $454.59; assessed to National Hotel Co.

RESERVATION B.

Of 16: front feet, w. 45.8; $289.66; assessed to B. F. Middleton and B. Beall.
Of 16: front feet, e. 6.6; $41.23; assessed to Benj. Beall.
Of 17: front feet, w. 22; $139.55; assessed to Benj. Beall.
Of 17: front feet, e. 3; $19.03; assessed to Sarah A. Greeves.
Lot 18: front feet, 25; $158.58; assessed to Sarah A. Greeves.

Lot 19: front feet, 25; $158.58; assessed to B. F. Middleton & B. Beall.
88 Lot 20: front feet, 25; $158.58; assessed to Mary Miller.
Lot 21: front feet, 25; $158.58; assessed Horace S. Johnson.
Lot 22: front feet, 25; $158.58; assessed to Chas. Stott.
Lot 23: front feet, 25; $158.58; assessed to Mary Preston.
Lot 24: front feet, 25; $158.58; assessed to Ann Phillips.
Lot 25: front feet, 25; $158.58; assessed to Fred. Plugge.
Lot 26: front feet, 25; $158.57; assessed to Sarah A. Greeves.
Of 27: front feet, 25; $158.58; assessed to Sarah A. Greeves.
Of 28: front feet, 25; $158.58; assessed to Joseph & Casper Barber.
Of 29: front feet, 25; $158.58; assessed to Geo. Bauer.
Lot 30: front feet, 25; $158.58; assessed to Thos. E. Young.
Lot 31: front feet, 25; $158.58; assessed to Jno. Fegan.
Lot 32: front feet, 25; $158.58; assessed to Matthew G. Emery.
Lot 33: front feet, 25; $158.58; assessed to Wm. H. Philip.
Lot 34: front feet, 25; $158.58; assessed to Jas. E. Young.
89 Lot 35: front feet, 25; $158.57; assessed to Jno. R. Murray.
Lot 36: front feet, 25; $158.57; assessed to Walter D. Wyvill.
Of 37: front feet, 25; $158.57; assessed to American Colonization Society.

RESERVATION 10.

Lot 1: front feet, 50.11; $322.96; assessed to Wm. B. Todd & others.
Of 2: front feet, 25; $158.58; assessed to Wm. B. Todd & others.
Of 3: front feet, 25; $158.58; assessed to Mary Keane.
S. 4: front feet, 25; $158.58; assessed to Ann W. Smith.
Lot 5: front feet, 25; $158.58; assessed to Geo. Savage & others.
Lot 6: front feet, 25; $158.58; assessed to Susan Ireland.
Lot 7; front feet, 25; $158.58; assessed to Jno. S. Devlin.
Lot 8: front feet, 25; $158.58; assessed to Antonio Bregazzi.
S. 53: front feet, 25; $158.58; assessed to P. W. Browning.
Lot 10; front feet, 25; $158.58: assessed to Joseph Follansbee.
90 Lot 11: front feet, 25; $158.58; assessed to Chas. F. Myers, trust F. E. Upperman.
Lot 12: front feet, 25; $158.58; assessed to E. H. Pendleton.
S. 51: front feet, 25; $158.58; assessed to Michael Shanks.
Lot 14: front feet, 25; $158.58; assessed to Jno. C. Rives.
Lot 15: front feet, 25; $158.58; assessed to Jno. C. Rives.
Of 16: front feet, 25; $158.58; assessed to Jno. P. Wiegman.
Lot 17: front feet, 25; $158.57; assessed to Matthew G. Emery.
Lot 18: front feet, 25; $158.57; assessed to W. W. Corcoran.
Lot 19: front feet, 26; $164.92; assessed to W. W. Corcoran.
Lot 20: front feet, 26; $164.92; assessed to Jno. G. Barthel.
Of 21: front feet, e. 25; $158.57; assessed to Columbus Alexander.
Of 21: front feet, w. 25; $158.57; assessed to Geo. Ailer.

RESERVATION A.

Lot 13: front feet, 52.11; $335.65; assessed to Jno. R. Murray.
Lot 14: front feet, 25; $158.58; assessed to Mary Ann Eckel.

91 Lot 15: front feet, 25; $158.58; assessed to Jno. C. Wilson & M. M. Allen.
Lot 16: front feet, 25; $158.58; assessed to Gallilean Fishermen.
Lot 17: front feet, 25; $158.58; assessed to Noble Young.
Lot 18: front feet, 25; $158.58; assessed to Jno. Riley.
Lot 19: front feet, 25; $158.58; assessed to Rob't Brown.
Lot 20: front feet, 25; $158.58; assessed to Fred Cudlipp.
Lot 21: front feet, 25; $158.58; assessed to Jno. M. Johnson.
Lot 22: front feet, 25; $158.58; assessed to Henry Lee.
Lot 23: front feet, 25; $158.58; assessed to W. W. Corcoran.
Lot 24: front feet, 17.7; $111.53; assessed to W. W. Corcoran.
Part: front feet, 7.5; $47.04; assessed to W. W. Corcoran.
Lot 25: front feet, 25; $158.58; assessed to Columbus Alexander.
Lot 26: front feet, 25; $158.58; assessed to Wm. W. Corcoran.
Lot 27: front feet, 25; $158.58; assessed to Geo. M. Oyster.
92 Lot 28: front feet, 25; $158.58; assessed to W. W. Corcoran.
Lot 29: front feet, 25; $158.58; assessed to Carl Mueller.
Lot 30: front feet, 25; $158.58; assessed to Henry Naylor.
Lot 31: front feet, 25; $158.57; assessed to Jno. McDermott.
Lot 32: front feet, 25; $158.57; assessed to Jno. McDermott.
Lot 33: front feet, 25; $158.57; assessed to Chas. Mades.
Lot 34: front feet, 25; $158.57; assessed to Chas. Mades.

RESERVATION 12.

Lot 1: front feet, 55: $348.87; assessed to Matthew G. Emery.
Lot 2: front feet, 25; $158.58; assessed to Matthew G. Emery.
Lot 3: front feet, 25; $158.58; assessed to Wm. C. O'Meara.
Lot 4: front feet, 25; $158.58; assessed to Wm. C. O'Meara.
Lot 5: front feet, 25; $158.58; assessed to Jos. Follansbee.
S. 19: front feet, 25; $158.58; assessed to August Grages.
93 Lot 7: front feet, 25; $158.58; assessed to H. L. Bond, trustee.
Lot 8: front feet, 25; $158.58; assessed to Wm. Morrow.
Lot 9: front feet, 25; $158.58; assessed to Jno. Purdy.
Lot 10: front feet, 25; $158.58; assessed to Jno. Purdy.
Of 11: front feet, 25; $158.57; assessed to Vinnie Ream.
Lot 12: front feet, 25; $158.57; assessed to Isabel Maury.
Lot 13: front feet, 25; $158.57; assessed to Isabel Maury.

SQUARE 575.

S. 1: front feet, 20; $126.86; assessed to John T. Killmon.
S. 2: front feet, 20; $126.86; assessed to Cassimer Bohn.
S. 3: front feet, 20; $126.86; assessed to Sam'l Norment.
S. 4: front feet, 20; $126.86; assessed to Thos. Carberry.
S. 5: front feet, 20; $126.86; assessed to Jno. Hitz.
S. 6: front feet, 20; $126.86; assessed to Gregory Ennis.
S. 7: front feet, 22.10; $144.83; assessed to W. W. Corcoran.
94 Lot 2: front feet, 59.8; $378.47; assessed to Jno. Purdy.
Of 3: front feet, e. 20; $126.86; assessed to Jno. Purdy.
Of 3: front feet, 19; $120.52; assessed to Fred. Steinle.

Of 3: front feet, w. 19; $120.52; assessed to Henry Kottman.
Of 4: front feet, e. 31; $196.64; assessed to Gregory Ennis.
Of 4: front feet, 15; $95.15; assessed to Gregory Ennis.
Of 4: front feet, 24; $152.23; assessed to Chas. Draine.
S. 60: front feet, 25.40; $161.12; assessed to Thos. H. G. Todd.

And in pursuance of said law, we have found the amount to be paid by the District of Columbia to be one hundred thousand two hundred and ninety-one dollars and four cents ($100,291.04).

And we further give notice that if any of the aforesaid railroad companies, or any private citizen, corporation, or person assessed as above shall neglect or refuse for the space of thirty (30) days from the date of
95 publication of this notice to pay to the collector of the District of Columbia the amount so assessed against them, respectively, we will, in pursuance of the law, issue certificates of indebtedness against the property, which certificates will bear interest at the rate of ten per centum per annum until paid, and which, until they are paid, will remain and be a lien upon the property on or against which they are issued.

W. DENNISON,
J. H. KETCHAM,
S. L. PHELPS,
Comm'rs of the District of Columbia.

je. 27.

96 In the supreme court of the District of Columbia.

W. & G. R. R. Co.
vs.
DISTRICT OF COLUMBIA & ITS COMMISSIONERS. } Eq. 5673.

Order for injunction restraining the issuing of certificates.—Filed July 16, 1877.

This cause having come on to be heard on the pleadings and exhibits therewith filed, and on the motion of the complainant for an injunction, and counsel having been heard on both sides, it is, this 16th day of July, 1877, ordered that upon the payment by the complainant to the defendant, or its solicitor, of the sum of $12,207.27, the said defendants be, and they are hereby, restrained according to the prayer of the bill, and from issuing any certificate or certificates against the property or any part of it under the act of July 19, 1876. It is further ordered this injunction stand until the further order of the court.

By the court.

97 *Receipt for* $12,207.27, *in conformity with the injunction order of July* 16*th*, 1877.—*Filed July* 24, 1877.

In the supreme court of the Dist. of Co.

W. & G. R. R. Co.
vs.
DISTRICT OF COLUMBIA AND COM'S. } Eq. No. 5673.

Received of the Washington and Georgetown Railroad Company, this

17th day of July, 1877, the sum of $12,207.27, being the amount directed to be paid by the complainant to the defendant in the above-entitled cause before the injunction therein should become operative.

JOHN F. COOK,
Collector of Taxes, D. C.

COLLECTOR'S OFFICE, DISTRICT OF COLUMBIA.
Paid July 17, 1877.

98 In the supreme court of the District of Columbia.

THE WASHINGTON AND GEORGETOWN RAILroad Company
vs.
THE DISTRICT OF COLUMBIA ET AL. } No. 5673. Equity.

Motion to dissolve injunction.—Filed Nov. 14, 1878.

And now come the defendants, by their solicitors, and ask the court to dissolve the injunction heretofore granted in this cause.

A. G. RIDDLE,
FRANCIS MILLER,
Solicitors for Defendants.

99 In the supreme court of the District of Columbia.

THE WASHINGTON AND GEORGETOWN RAILroad Company
vs.
THE DISTRICT OF COLUMBIA ET AL. } No. 5673. Equity.

Replication.—Filed Dec. 9, 1878.

The plaintiff hereby joins issue with the defendants upon their answers, and denies the averments therein contained.

ENOCH TOTTEN,
Solicitor for Complainant.

100 In the supreme court of the Dist. of Co.

W. & G. R. R. Co.
vs.
THE DIST. OF CO. ET AL. } Eq. No. 5673.

Order overruling motion to dissolve injunction and allowing 30 days to take testimony.—Filed Jan. 17, 1879.

This cause coming on to be heard, on motion of the defendants to dissolve injunction printed herein, and having been argued by counsel and considered by the court, it is thereupon, this 17 day of Jan., 1879, ordered that the action of the defendant to dissolve injunction be, and the same is, denied.

And it is further ordered that the complainant be limited to thirty days from date hereof in which to take its testimony.

By the court.

MACARTHUR, *Justice.*

101 In the supreme court of the District of Columbia.

W. AND G. R. R. Co. v. DIST. OF COL. } Equity No. 5673.

Please take notice that on Tuesday, the 11th day of February, 1879, at the hour of two o'clock p. m., I shall proceed to take the testimony of witnesses in behalf of the complainant in the above-entitled cause, at my office, before F. H. Howe, esq., an examiner of this court.

You are invited to be present on that occasion.

ENOCH TOTTEN,
Solic. for Compl't.

To Mess. RIDDLE & MILLER,
Sol's for Def't.

Service of copy of above notice acknowledged this seventh day of February, 1879.

A. G. RIDDLE, *Att'y D. C.*

102 In the supreme court of the District of Columbia.

W. AND G. R .R. Co. v. DIST. OF COLUMBIA. } Eq. No. 5673.

Testimony for complainant.—Filed Feb. 19, 1879.—EDMUND A. BAILEY, *Reporter.*

103 WASHINGTON, D. C., *February* 11, 1879.

Met pursuant to notice hereto attached. Present, Mr. Enoch Totten, counsel for complainant; Mr. Francis Miller, counsel for defendant.

EDWARD CLARK, sworn on behalf of complainant, deposes and says:

Examination by Mr. E. TOTTEN.

Ques. What is your name and residence and occupation?

Ans. Edward Clark, residing at 417 Fourth street, architect of the Capitol.

Ques. Were you a member of what is known as "the paving commission" appointed in 1876?

Ans. I was and am. That commission runs for three years.

Ques. The commission to pave Penn. ave.?

104 Ans. Yes, sir; I am a member of that commission.

Ques. Were you present at the deliberations of the commission, and did you take part in the ascertainment of the kind of pavement to use?

Ans. I did.

Ques. And of the assessment for the expense thereof?

A. I did.

Q. Will you be good enough to state how it happened that this blue-stone curbing was placed along the side of the outer rails of the company's track?

A. The law provided that this paving should be done in the best manner. The commission, in examining similar pavements—concrete pavements—along which railways ran, found that in every instance the vibration of the stringer broke or disentegrated the pavement along its line or edge, and to obviate that it was thought best to put in a curb to prevent the vibration of the stringer interfering with the pavement.

105 Q. Was that blue-stone put there for the benefit of the railroad company or at its request?

A. It was not; it was put there for the general benefit of the pavement.

Q. Did you have any conversation—when I say "you" I mean the commission or the members of it—with any one representing the railroad company as to the expense or cost of that blue-stone?

A. I had none; I know of none having been had.

Q. Was there anything said by the railroad company touching the question of charging it to them as being within the two outer feet?

A. Not to my knowledge; I never heard of such a conversation.

Q. Did the railroad company make any protest to you or objection?

A. Not to my knowledge.

Q. Well, do you know whether the commission notified the railroad company of their determination to put this blue-stone there?

106 A. No; I do not know.

Q. Do you know what the relative cost is between blue-stone and the ordinary pavement which is put down on the remainder of the street; which costs the most?

A. The blue-stone, for the given area.

Mr. TOTTEN. I mean the square yard.

A. (WITNESS.) The blue-stone costs more; it costs, I think, over double the price; that is my impression.

Q. Could this blue-stone, in your judgment, contribute anything to the benefit of the railroad company?

A. Not at all.

Q. Will you look at the paper mailed Exhibit D, filed with the original bill in this cause (handing the paper to witness), and see if that is correct, according to your recollection of it, as to the distribution of the burthen of expense?

107 A. (After examination of the paper.) I should judge this is a copy of the original bill.

Q. Do you know anything about the work done by Mr. J. J. Burrows or Borrows?

A. Yes, sir.

Q. What was the nature of the work done by him?

A. The nature of the work done by Mr. Burrows was altering sewer-traps—sewer openings—changing the curbing, and in some places relaying the footways where the curb had to be straightened.

Q. Do you know on what part of the avenue he did this work?

A. Nearly all along the ave.—different parts—but the cost of that was aggregated in the whole cost of the pavement.

Q. That was put into the general sum total of the expense?

A. Yes, sir.

Q. And distributed amongst all the persons to bear the expense,
108 the railroad company included?

A. Yes, sir.

Q. Do you know what proportion of his work was done in straightening up curbs and relaying sidewalks? Was it the half or the quarter?

A. No, sir; I could not say without referring to the vouchers in detail.

Q. Well, in that $4.06 is the cost of this *of this* blue-stone curbing included?

A. Yes, sir.

Q. Do you know anything about the underpinning of the railroad tracks that was done in consequence of the deep excavations made by the commission?

A. Yes, sir.

Q. Well, can you explain how that became necessary?

A. That became necessary because the excavation for the concrete-bed in many cases brought it below the bottom of the stringer, and the weight of the road crushed the earth from under the stringer and caused the stringer to vibrate very much, and to correct that the railway was in many cases underpinned.

Q. This work became necessary, then, in consequence of the fact of the depth of the excavation?

109 A. Yes, sir.

Q. Well, did you do the work of underpinning?

A. Well, I am not clear about that.

Q. Mr. Clark, the railroad company was in no way responsible for that, was it?

A. No, of course not.

Q. The expense of that was probably charged in the general expense of the whole work, was it not?

A. It was either done that way, or the railroad company did it; I am not clear which, but if done at all the expense was aggregated in the whole expense and divided by the number of yards in the ave. It occurs to me that that was part of Burrows' work. In the bill (referring to Exhibit D) I see here is the date of his vouchers but merely the aggregation of $2,318.04. I think that was a part of Burrows' work too.

Q. The underpinning of the railroad company's tracks?

A. Yes, sir.

110 Q. To proceed to another subject, what was the condition of the old pavement at the time you began this work on the avenue?

A. It was in very poor condition—the wooden pavement—almost impassable.

Q. Can you tell us what the condition of the pavement between the rails of the railroad and between the tracks of the railroad was at the time you began work?

A. It was in very good condition; that was the best part of the avenue.

Q. Of what material was the pavement between the tracks made?

A. Cobble-stones.

Q. With what material are the tracks paved now?
A. Granite.
Q. And the space between the tracks?
A. Granite blocks.
Q. Was that work well done by the company?
A. Yes, sir.

Q. Who dictated the kind of pavement to go between the tracks?
111 A. The avenue commission; they had the right under the law to do it.

Q. Did the railroad company make any objection to the Belgian blocks?
A. They made very strong objection. They read authorities from engineers from all parts to show that the cobble-stone pavement was the very best kind.
Q. They failed to convince the commission?
A. The commission were too obtuse for them. The commission said that from their standpoint they were correct, but that we looked at it from a different point of view.

Cross-examination by Mr. MILLER:

Q. Mr. Clark, I would like you to state a little more clearly the fact as to this underpinning; by whom it was done, and how it was charged.
112 A. It was either done by the railroad company, to secure their own track, which would have fallen down, or, if done by the commission, it must have been done by Burrows and charged in his bill, and aggregated in the general cost. But as to that I am not clear. Mr. Partridge, who was the engineer, and took minutes of everything that was done, could give the information as to that.
Q. If it had not been for this railway, there would have been no necessity for any blue-stone of course?
A. No, sir.
Q. Could the road-bed have been kept in good condition without the use of that stone?
Mr. CLARK. The underpinning?
Mr. MILLER. I mean the concrete pavement in connection with the tracks.

A. I don't think it could, because it would have caused the break-
113 ing; you will see that the least vibration of the stringer caused the pavement to break, and it was for the preservation of the whole pavement that this blue-stone was put down.
Q. In your judgment it was essential to the proper execution of the work?
A. It was, and I think experience has shown that.

Redirect examination by Mr. TOTTEN:

Q. Was there any discussion or intention by the commission about running a line of blue-stone through the centre of the avenue anywhere?
Mr. CLARK. How through the centre?
Mr. TOTTEN. Suppose the railroad had not been there?
A. Then it would not have been necessary to put the stone down, because the arch of concrete would been continuous.

114 Recross-examination by Mr. MILLER:

Q. The whole object was to prevent the breaking of the pave-

ment at the junction of the pavement with the track just as you see it on Ninth street now?

A. Yes, sir; the commission made out their report. They aggregated the entire cost, and divided it by the number of yards in the avenue. But the District Commissioners disagreed, and said we had no right to do that; that this blue-stone was for the especial benefit of the railroad company, and they sent the report back to us; and we had a meeting again, and discussed the same thing over; but we were stupid enough to adhere to our old ideas. I think those documents containing the action of the commission on the subject were printed.

115 Q. The question was a question of law as to which of you should make the assessment, of course?

A. Yes, sir.

By Mr. TOTTEN:

Q. After you got through with this work you conglomerated the whole expense into one sum, exclusive of the pavement between the outer rails—done by the railroad company between its outer rails?

A. The paving between the tracks we had nothing to do with.

Q. You had nothing to do with that?

A. No, sir; the bill gave the commission the power to choose the material for paving the space between the tracks. Having selected this stone pavement as being less objectionable to the railroad company than the asphaltum, and not so objectionable to the public as a cobble-stone

116 pavement, the railway company expressed a desire or willingness to put that down; that is, if the commission would allow them to do so; and not having any objection, we accorded them that privilege; but that did not go into the cost at all.

By Mr. MILLER:

Q. Please explain the circumstances of the selection of the two pavements; why the two pavements were selected.

A. The commission were of the opinion that these pavements were analogous in composition and in manner of putting down; the Neuchatel being a mixture found in natural scources, and the other pavement arrived at the same thing by artificial means. The principal thing that induced the commission to make the selection was the knowledge that the Neuchatel rock was not in the country and it was believed it could not be

117 brought in time to complete the pavement in the time allowed by law.

Q. Are the two pavements substantially the same?

A. They are, with the difference I name.

Q. One being a natural and the other an artificial compound?

A. Yes, sir. The Neuchatel Company imported their work, sending off to Neuchatel, Switzerland; whereas the coarser part, 80 per cent., of the Grahamite pavement is gotten in our country, saving the cost of freight.

By Mr. TOTTEN:

Q. Does this blue-stone constitute any part of that concrete pavement?

A. No, sir; it is only a protection to it.

Q. It has the same relation to the paved street that the curb-stone along the sidewalk has?

118 A. Yes, sir; to keep it in place and protect it from injury.

Q. Would not rough, undressed stone have been just as good?

A. Yes, sir?

Q. How is this blue-stone dressed?

A. Sawed by machinery.

Q. What is the length of those stones?

A. I suppose running from four to eight feet.

Q. Five inches wide?

A. Yes, sir.

Q. How thick?

A. Eight inches deep.

Q. In what way were they bought—by the yard?

A. By the linear foot.

Q. From where did they come?

A. North River.

Q. Were they prepared and sawed up there?

A. Yes, sir.

Q. Shipped just as they came down?

A. Yes, sir; they were as cheap as rough stone would have been. This blue-stone being sawed by steam cost as little as if they had been
119 rough stone slightly hammered.

Q. The rough stone wouldn't have looked as well?

A. It was important, in the opinion of the commission, that the appearance should be observed. The avenue being more of a pleasure than a business street—a boulevard—it was thought that the pavement should be an even and pleasant one to drive over.

Q. So as to make it acceptable to everybody?

A. Yes, sir. You see the law provides that this should be the best pavement. Now, what is the best pavement? For a business street, cobble-stone probably would be, but it wouldn't suit for the avenue. The Belgian rock comes next; but that wouldn't suit; it would have been better along a wharf or levee, where there is heavier traffic. But this was considered more a pleasure street than a business street—more for
120 light than for heavy travel, and therefore the concrete was selected.

Q. Why didn't the paving commission charge this blue-stone to the railroad company?

A. Because it was supposed to be for the benefit of the entire pavement; they got their benefit of it, and are charged proportionately for it.

By Mr. MILLER:

Q. You exercised your best discretion in the selection and laying down this pavement?

A. Most indubitably.

By Mr. TOTTEN:

Q. What is the proper name of this blue-stone; do you call it the "curb?"

A. I should call it a "carb"; yes, sir.

EDWARD CLARK.

121 HENRY HURT, produced and sworn on behalf of the complainant, deposes and says:

Examination by Mr. TOTTEN:

Q. State your name and your occupation.

A. H. Hurt, president of the Washington and Georgetown Railroad Company.

Q. How long have you been president of the Washington and Georgetown Railroad Company?

A. Between four and five years.

Q. Prior to that time what relation to the company did you occupy?

A. Secretary and treasurer.

Q. For how long a time had you been secretary and treasurer?

A. Between three and four years.

Q. Do you remember when the wooden pavement was put down on Pennsylvania avenue?

A. Yes, sir.

Q. Can you give the date of it? (after a pause) it is not material if you can't.

122 A. I cannot give the exact date of its being put down.

Q. How much did that pavement cost the railroad company? What was the cost for doing its share of the work made necessary by the statute requiring that avenue to be paved?

A. I couldn't state the whole cost.

Q. Can you state the expense that the railroad company was put to under the provisions of the act of Congress providing for that wooden pavement?

A. I can state the exact expense for the two feet adjoining the outer rails.

Q. What was it?

A. Between eleven and twelve thousand dollars. That was simply for the wood outside of the exterior rails.

Q. Was the grade of Pennsylvania avenue, when the wooden pavement was put down, altered in any way?

A. Yes, sir.

Q. Where?

123 A. Throughout its entire length.

Q. Did the railroad company reduce or elevate its grade to conform to the established grade?

A. They did, at a very heavy expense.

Q. With what material was the spaces between the rails and between the tracks paved prior to the wood pavement being put down?

A. Cobble-stones.

Q. Did you take the cobble-stones up at the time of this wooden pavement being laid?

A. Yes, sir.

Q. Did you replace them?

A. Yes, sir.

Q. Can you tell us the expense of grading and taking up and relaying this cobble-stone pavement, the company was put to?

A. I could not exactly.

Q. About what?

A. I should say about ten thousand dollars.

(Mr. Miller objects to all the preceding testimony relating to the wooden pavement.)

124 Q. How much money did the last pavement cost; the work done by you in pursuance of the last act of Congress?

A. Between twenty-three and twenty-four thousand dollars.

Q. For what was that paid?

A. For paving between the tracks.

Q. Mr. MILLER. With the Belgian rock?

A. Mr. HURT. Yes, sir.

Q. Mr. TOTTEN. What became of the cobble-stones; did you take them up?

A. Yes, sir.

Q. Did you have any grading to do during the last pavement?

A. Yes, sir.

Q. How much?

A. I should think about five thousand dollars' worth.

Q. Did they elevate the grade or lower it?

A. Lowered it.

Q. Where?

A. Almost throughout the entire distance. We just took out the dirt we put in before.

125 Q. Including the assessment made by the paving commission, how much was the entire cost to the railroad company of this last pavement?

A. Between thirty-five and thirty-six thousand dollars.

Q. Has that money all been paid?

A. Yes, sir.

Q. How did it happen that this blue-stone curbing was put down along the outer rails, so far as you know?

A. The commissioners did it of their own accord.

Q. Did they give you any notice of the fact that they were about to use that material?

A. They notified us that they were going to do it.

Q. What happened then? What did you do?

A. We went to see them in person.

Q. Who?

A. Generals Gillmore and Wright, as near as I can remember.

Q. Who went?

126 A. I myself; I went to see them. The question as to the cost of it was raised, and they said, as well as I can remember, that the cost of the blue-stone would be charged into the general cost of the work, and to be charged pro rata; to which we didn't object.

Q. Did you give them any notice then of your unwillingness to being charged with the whole of that blue-stone pavement?

A. Most assuredly we would, if we had had any idea that that would be the case.

Q. But did you tell them that you would protest against and object to paying for that blue-stone, if they intended to charge it to you?

A. I do not know; they did not state that they intended to charge it to the company.

Q. How did they charge it?

A. According to their official report, in the general cost of the work.

Q. Where did you have this conversation with them?

127 A. I had different conversations with them—some, perhaps, in their room in the Capitol; and others on the street, as well as I can remember, with Gen. Wright. They were on the work frequently.

Q. Is that blue-stone curbing any benefit to your railroad company?

A. None whatever.

Q. Would rough stone have done just as well?

A. Yes, sir; better.

Q. What difference would there have been if the concrete pavement had been laid close up to the track?

A. No difference to the company.

Q. It would have made a difference in the expense, wouldn't it?

A. Yes, sir; it would have made it less than the paving commissioners assessed it.

Q. When did you first get notice that it was the intention of the District Commissioners or anybody else to assess the entire cost of this blue-stone upon the company?

128 A. The first notice we had of it was when the official assessments were published.

Q. In the newspaper?

A. Yes, sir.

Q. That notice that you have set out in your bill?

A. Yes, sir.

Q. Have you paid the assessment made by the paving commission?

A. Yes, sir. At the rate of $4.06 a yard.

Q. What do you know about the charge that is contained in that general assessment for underpinning the railroad company's tracks?

A. I know that there was some blue-stone used in underpinning; I don't know anything about the manner in which it was charged.

Q. The railroad company paid nothing for it?

A. No, sir.

Q. It had nothing to do with it?

A. No, sir.

Q. What was the character of that old wood pavement that was put down?

A. Rotten.

129 Q. How long did it last? (After a pause.) The old wood pavement was practically a fraud upon the people, wasn't it?

A. It was so considered.

Q. You considered it so?

A. Yes, sir.

Q. Do you know what the nature of this work done by Mr. Burrows was?

A. I think Mr. Clark stated the nature of it correctly, as far as I can remember.

Q. That was not for the benefit of the railroad company, in any way, was it?

A. No, sir.

Q. Do you know how the paving commission which put down the wood pavement distributed the expense?

A. I think they charged the whole cost of the work into a sum total, and divided it pro rata.

Q. Without regard to extra work in small places?

A. Without regard to extra work in any place—the same as
130 this paving commission did—that is the general way of doing that kind of work, I believe. We were assessed at the same rate per square yard that other property holders were at that time; that is what I judge by.

Cross-examination by Mr. MILLER:

Q. Mr. Hurt, do you think the pavement along the line of your track would have remained perfect without the use of this blue-stone?

A. It would have remained as perfect if they had used a stone of less expense.

Q. But without any stone?

A. I think the stone is a benefit to the pavement, but I think Belgian blocks, used as this city now uses them, would have answered better and cost less.

Q. Without some stone there, it would have been more difficult for you to get a car on the track, wouldn't it?

A. It is no benefit in that respect; the only benefit is in respect
131 to the wear of the concrete.

Q. If the car got off the track and there was a rut on the outside wouldn't it be more difficult to get it on the track?

A. That wasn't the object in view in putting it down; we could lift the car on the track, for that matter.

Q. The object was to prevent these ruts, of course?

A. The object was to protect the concrete pavement.

Q. An incidental advantage to you was, that the ruts were prevented, and thereby you were enabled to get your car on the track more easily?

A. No, sir; we don't acknowledge that there was any advantage in that respect; the car is not expected to run off the track.

Q. No, but occasionally they do?

A. Very rarely now.

Mr. MILLER. Now that you have been braced by these curbs of blue-stone.

H. HURT.

Adjourned.

132 In the supreme of the District of Columbia.

W. & G. R. R. Co. }
vs. } Eq. No. 5673.
DIST. OF COLUMBIA. }

DISTRICT OF COLUMBIA,
County of Wash., ss:

Be it remembered that at an examination of witnesses begun and held on the 11 day of February, A. D. 1879, and continued from time to time

until the day of , A. D. 18 , when the within depositions were taken, I, Frank H. Howe, an examiner in chancery, did cause to be personally present at my office, in the city of Washington, in said District, the within-named Edward Clark and Henry Hurt, to testify on
133 the part and behalf of the complainant in the above-entitled cause.

And I do hereby certify that, in pursuance of the within notice, the annexed depositions were taken down and reduced to writing in the presence of and from the statements of the several witnesses at the time and place herein designated, and were read over by the witnesses, and by them subscribed, the witnesses having been by me first duly sworn to tell the truth, the whole truth, and nothing but the truth touching the matters at issue in said cause.

I further certify that I am not of counsel for either of the parties to said cause, or in any manner interested therein.

FRANK H. HOWE,
Examiner in Chancery.

WASHINGTON, D. C., *Feb.* 18, 1879.

134 *Decree of perpetual injunction v. the defendants.—Filed Nov.* 29, 1879.

In the supreme court of the District of Columbia.

THE W. AND G. R. R. CO.
vs.
THE DIST. OF CO. AND OTHERS. } Equity No. 5673.

This cause having come on to be heard on the pleadings and evidence, and having been argued by counsel, and it appearing to the court that the complainant was ready and willing to pay the sum of twelve thousand two hundred and seven dollars and twenty-seven cents ($12,207.27), and that the temporary restraining order was to become operative upon the payment of the said sum to the District of Columbia, and that the said complainant did, on the seventeenth day of July, A. D. 1877, pay over to the proper officer of the District of Columbia the said sum of money, which
135 was duly received and receipted for, and upon consideration of the premises, it is, this twenty-ninth day of November, A. D. 1879, ordered, adjudged, and decreed that the defendants, The District of Columbia and the Commissioners of the District of Columbia, be, and they are hereby, perpetually restrained and enjoined from issuing any certificate on account of the assessment made by the Commissioners of the District of Columbia against the Washington and Georgetown Railroad Company for paving Pennsylvania avenue, or any part thereof, or from advertising, or causing to be advertised, any property of the Washington and Georgetown Railroad Company by reason of such assessment, and from collecting, or attempting to collect, any part of the said assessment, as prayed in and by the said bill.

It is further ordered, adjudged, and decreed that the costs of said suit, to be taxed by the clerk, shall be paid by the District of Columbia. And the defendants appeal to the general term.

By the court.

MACARTHUR, *Justice.*

136 In the supreme court of the District of Columbia.

W. & G. R. R. Co.
vs.
DIST. OF COLUMBIA ET AL. } Eq. No. 5673.

Stipulation of counsel relative to certain papers, etc.—Filed Feb. 19, 1879.

It is hereby stipulated and agreed in this cause as follows, to wit:

1. That Exhibits A & B, filed with the original bill, are true copies of the contracts of which they purport to be copies, and were duly executed and delivered by the said commission; that the paper hereto attached and marked "Report of Commission" is the report of said commission relating to said pavement, made to the President of the United States, together with the advertisement for proposals for paving the said avenue under the provisions of the said act of Congress of July 19, 1876;

137 that the said commission did in fact determine to and did put down two kinds of pavement on said avenue, as mentioned and described in the said Exhibits A and B. Said papers are to be read and considered at the hearing with the same force and effect as if the original thereof had been produced and proven.

2. That Exhibit C, with said bill, constitutes the proposal of J. J. Burrows, as alleged in the bill, and that the proposals were accepted by the said commission and the work charged for in Exhibit D, with the bill, as having been done by said Burrows, was done by virtue of these proposals and the acceptance thereof by the commission.

ENOCH TOTTEN,
For Complainant,
and FRANCIS MILLER,
Of Counsel for Dist. of Columbia.

138 *Report of commission.*

WASHINGTON, D. C., *Dec.* 20, 1876.

To the President of the United States:

SIR: The undersigned, commissioners appointed in the act of Congress approved July 19, 1876, authorizing the repavement of Pennsylvania avenue, have the honor to submit the following report of the progress of the work committed to their charge.

There being nothing in the act, and the undersigned having received no instructions indicating to whom this report should be made, it has been thought proper to address it to the President of the United States.

The commission held its first meeting on the 29th of July, and organized by selecting General Wright as president and Mr. Clark as secretary, and on the same day issued invitations for proposals, to be accompanied by full specifications for paving that portion of the avenue contemplated in the law. A copy of the advertisement, marked A, is appended to this report.

139 Subsequently a communication was addressed to the respective chairmen of the Committees on the Dis. of Co. in the two Houses

of Congress, expressing the unanimous opinion of the commission that the work could not be completed and ready for use by Dec. 1st, as provided in section 2 of the act, and recommending the repeal of that proviso. In partial compliance with this suggestion, the act of August 15th was passed, extending the time for completing the pavement to Jan. 15, 1877. All proposals received were opened on the 8th of August, in the presence of the bidders or their representatives. They embraced four general classes of pavement:

1. Blocks of granite or trap-rock, for which there were twenty-one bids at prices ranging from $1.56 to $4.30 per superficial yard.

2. Blocks of compressed asphaltum, for which there was one bid, at $4.20 per square yard.

3. Continuous-surface pavement, in some of which the cement-
140 ing medium of the wearing-surface is asphaltum alone; in others a mixture of asphaltum and the products of coal-tar, and in others the product of coal-tar alone. For these there were twenty bids, at prices varying from $2.74 to $4.30 per superficial yard.

4. A Telford roadway, for which there was one bid at $2.80 per superficial yard.

A list of these proposals, marked B, is hereunto appended. At an early stage in the deliberations of the commission, it was voted to exclude the stone block pavements and the Telford roadways as unsuitable for the avenue, and subsequently, after spending some days in analyzing the bids, and in receiving from the several bidders such information concerning their respective pavements as they desired to submit, and in listening to the representations of property owners on the avenue, and other residents of the city, it was further determined to exclude all these concrete pave-
141 ments in which the products of coal tar largely predominated in the wearing surface, thus reducing the bids and specifications requiring consideration to a comparatively small proportion of the whole number received.

On the 12th day of August the work of paving that portion of the avenue and adjacent triangles between the west side 15th street and the east side of 6th street was awarded to the Grahamite and Trinidad Asphalt Pavement Company, and a contract for the same, a copy of which is herewith submitted, marked C, was duly executed on the 21st of the same month. The contract price is $3.78 per superficial yard.

The work between the east side of Sixth street and the Capitol grounds was awarded to the North American Neuchatel Rock Paving Company on the 16th of August, on condition that the price per yard should be the same as that allowed the Grahamite company, being a reduction of
142 52 cents per square yard on the price mentioned in the proposal. The contract, hereunto appended, marked D, was executed on the 23' of August.

The contracts embody a brief description of the respective pavements, and also provide for suitable laying, on a concrete base, a stone curb, at a cost of 70 cents per linear foot, against the exterior rails of each track of the several street railways traversing the avenue.

The contractors proceeded promptly with their preparations for executing the work awarded to them, respectively, in procuring and erecting new and improved machinery and in obtaining the requisite supplies of material and labor.

The laying of the concrete base was begun by the Grahamite company on the 12' of September, and by the Neuchatel company a few days later.
Both companies commenced laying the top or wearing surface early
143 in October, and have pressed the work forward daily from that time to this when not prevented by unfavorable weather, temporary derangement of machinery, or the unfit condition of the foundation to receive it.

Some unavoidable delay has occurred at First street while awaiting the construction of a curb around the site selected for the Naval Monument, and in making the alterations in the curves of the street railway tracks rendered necessary thereby.

GRADING AND DRAINAGE.

As the grading of the avenue had apparently been originally regulated in reference to each individual square, without much regard to the adjacent ones, it was not an easy matter to establish satisfactory grades for the street as a whole; and as the pavements selected required a comparatively flat surface, it was necessary to remove throughout almost the entire length
a large amount of earth from the center of the street, and to lower
144 the railroad tracks, and at several points to raise the curbstones a few inches, at one point as much as 13½ inches, and relay the corresponding sidewalks. It was also necessary in many cases to increase the inlets to the sewer-basins, to insure the discharge of the surface water in heavy rains, and in some instances to change the positions of these inlets to adapt them to the new grades. The man-hole and stop-cock boxes for water, of which there are about 37 through the body of the pavement, had to be raised and lowered to conform to the new grades. Proposals were invited for the work from several parties engaged in such business, and the offer of Mr. John J. Burrows, a copy of which is appended, marked E, was accepted. The resulting grades are pretty satisfactory, and the drainage is believed to be an improvement on that hitherto existing.

STREET RAILROADS.

By the third section of the act, the Washington and Georgetown Railroad Company is restricted in the paving between the exterior rails
145 of its tracks to the use of cobble stones or Belgian blocks, as the commissioners shall direct. The commission designated the latter, in blocks not less than 2¼ by 8 inches by 5 to 6 inches deep.

The road has been paved accordingly from Fifteenth street to Sixth street with the North River blue-stone, and thence to the Capitol grounds with Richmond granite. Section 7 of the act provides that where street railroads cross the avenue, the pavement between their tracks shall conform to the kind of pavement used on the avenue; and the roads crossing at Fourteenth and Ninth streets are to be paved accordingly. The road crossing the avenue at Seventh street belongs to the Washington and Georgetown Railroad, and is claimed to be subject only to the requirements of section 3. In view of the doubt existing as to the inten-
146 tion of the law in this particular, and as a majority of the

commission considered a pavement of Belgian blocks to be the most appropriate for the tracks at a point like this, where it is subject to a very heavy traffic, far exceeding that at any other point on the avenue, the railroad company were authorized to pave this crossing in the same manner as prescribed for the main portion of their road.

CHARACTER OF PAVEMENT SELECTED.

It has been already stated that the stone-block pavement and the Telford roadway were excluded by the commission. While stone blocks may be essential to the durability of a roadway constantly crowded with heavy traffic, and while they possess the advantage of affording a comparatively secure footing for animals, they are so very noisy and so difficult to keep clean as to render them undesirable on a street like Pennsylvania avenue, which is mainly used for pleasure driving and for traffic in com-
147 paratively light vehicles. The Telford roadway, while affording a smooth and pleasant surface for driving when kept in good condition, needs a constant and daily attention in the way of repairs, and frequent sprinkling in dry weather, which it would be impossible to secure with any certainty. Moreover, the muddy surface in wet weather is always considered an objection to it in this country, except for suburban roads.

It is believed also that neither of these kinds of pavements would have met the wishes of the citizens of Washington or of Congress.

It has also been mentioned that concrete pavements in which the products of coal tar as the cementing material largely predominated in the top or wearing surface were ruled out. It was the belief of the commission that while such pavements, if well constructed, were excellent when first laid, they were subject to rapid deterioration within a few years, owing to the escape of the volatile oils they contain, and this
148 opinion seemed to be fully sustained by the experience had with such pavements in Washington, which have needed resurfacing in three or four years.

Experience has shown that pavements in which the cementing ingredient is asphalt, which does not contain the volatile matters found in the coal-tar products, are not subject to the same rapid deterioration, and that they will last when well laid, without sensible wear, for a great many years. If a continuous surface pavement was, therefore, to be selected as one best suited for the avenue, it was the opinion of the commission that the kind in which asphalt alone forms the cementing ingredient should be chosen. Of these were selected the pavement as laid by the Grahamite and Trinidad Asphalt Pavement Company and that of the North American Neuchatel Rock Paving Company. Both are laid on a continuous bed of hydraulic concrete, not less than eight inches thick. The top
149 layer or wearing surface of the former is an artificial mixture of sand with about 20 per cent. of refined asphalt, and the latter is of the Neuchatel rock from Switzerland, which is a natural stone impregnated with asphalt.

The former has been tried on several blocks in the city of New York, where it has been subjected to travel from three to four years without sensible wear. The piece on Fifth avenue, in New York, opposite to the

Worth Monument, between Twenty-fourth and Twenty-fifth streets, was laid in June, 1873, and has experienced a trial far beyond that which it will be subject to here in twice that length of time. A piece cut out in August last, and now in possession of the commission as a standard of the quality of the pavement to be laid on the avenue, showed no appreciable signs of wear or other deterioration.

The pavement of Neuchatel rock has long been used in Europe,
150 especially in the cities of Paris and London, and bears the character of a first-class pavement of its kind. In view of the long experience had with this pavement abroad, the commission was not disposed to exclude it from their choice if it could be contracted for at the same price per yard as the Grahamite. By dividing the contract, an earlier completion of the work was secured, and an opportunity afforded for definitely determining the relative qualities of the two—a question which the commission found itself unable to decide, as is shown by its considering both as fulfilling the condition of being the "best pavement" required by the act. Continuous surface pavements, whether containing asphalt, the products of coal tar, or a mixture of the two, as their cementing medium, depend for their quality upon the proportions of the ingredients used, the amount of heat employed in the preparation, and thorough work in laying.

If too great heat be applied the mixture loses its cementing prop-
151 erties, and the pavement becomes little better than a mass of loose powder. This cannot generally be determined during either process of mixing or laying, but is soon developed by use. Where this happens, the defective portion is removed and new material substituted therefor. A large percentage of the top surface under each contract has been condemned by the commission, and has been or will be relaid.

AMOUNT OF WORK DONE.

The Grahamite company have finished the pavement on the north side of the avenue between Fifteenth and the east side of Sixth street, and nearly all of the hydraulic concrete foundation on the south side. Four or five good working days will suffice for the completion of the foundation. This would have been put down before this time but for the freezing weather, which has necessitated the stoppage of the work while the low temperature continued. The Neuchatel company have completed the pavement on both sides of the avenue from the east side of Sixth street to
152 near First street, and require only two or three days of good weather to enable them to finish their contract.

PROBABLE TIME OF COMPLETION.

As but little remains to be done under the contract with the Neuchatel company, it is not supposed that the weather can prevent its completion before the time fixed by law. As regards the much larger amount of work remaining unfinished under the contract with the Grahamite company, its completion by the 15th of January can scarcely be expected, and believing that the company has prosecuted their work with due diligence, the commission recommend that the requirement of the law for its completion by

that day be either repealed or that the time be extended to February 15, 1877.

Respectfully submitted.

H. G. WRIGHT,
B'v't Maj. Gen. U. S. A.,
Q. A. GILLMORE,
B'v't Maj. Gen. U. S. A.,
EDWARD CLARK,
Commissioners.

153 A.—*Proposals.—Proposals for paving.*

OFFICE OF COMMISSION FOR PAVING PENN. AVE.,
Washington, D. C., July 29, 1876.

Sealed proposals will be received at the office of the Architect of United States Capitol until 12 m. on Tuesday, the 8th day of August, 1876, for repaving Pennsylvania avenue, in this city, between the Capitol and the Treasury building, under the provisions of the act of Congress approved July 19, 1876.

The proposals must be accompanied by detailed specifications, giving the depth of the proposed pavement, the method to be followed in laying it, and the nature and proportion of its constituent parts.

Bidders for stone-block pavements will specify the character of the foundation, the sizes of the blocks, and the quarries from which they are to be supplied.

Proposals must be made by the superficial yard, which will in-
154 clude the cost of readjusting the curb-stones wherever necessary to secure a straight line on the face and top, and the cost of removing the present pavement and delivering the same to the Commissioners of the District of Columbia, as provided in the act.

The proposals for all other than block pavements must also include the cost of lowering the crown of the street wherever the commissioners shall consider it necessary, in order to establish more gentle slopes from crown to the gutters. Proposals for this class of pavement should give separate estimates for different thicknesses, from ten inches up to thirteen inches, and must also give the thickness of the surface or wearing layer.

All proposals must include the cost of keeping the pavement in good repair for a term of three years from the completion of the contract.

No proposal will be entertained unless accompanied by a bond, in the sum of $100,000, signed by two responsible bondsmen and approved as to sufficiency by a judge or clerk of the United States court or a
155 United States district attorney, that the bidder will, if the work be awarded to him, enter into a contract within ten days after the award is made, and construct the pavement according to the terms of the contract and specifications.

Payments will be made on account from time to time as the work progresses, and as the funds become available. Upon final settlement ten per cent. of the contract price will be retained as an additional security and gaurantee fund to keep the pavement in good repair for the term of three years, which ten per centum will be invested in the bonds of the United States and the interest thereon paid to the contractor. Upon application

by letter a copy of the act of Congress authorizing this work can be obtained of Edward Clark, esq., member of the commission, at the office of the Architect of the United States Capitol, Washington, D. C.

H. G. WRIGHT,
B'v't Maj. Gen. U. S. A.,
Q. A. GILLMORE,
B'v't Maj. Gen. U. S. A.,
EDWARD CLARK,
Commissioners.

156 In the supreme court of the District of Columbia.

WASHINGTON AND GEORGETOWN RAILROAD Company, complainant, *v.* THE DISTRICT OF COLUMBIA, DEFENDANT. } In equity. No. 5673.

This cause came on to be heard upon the defendant's appeal from the decree of the special term of November, 1879, and was argued by counsel and submitted to the court; whereupon, on consideration thereof, it is ordered, adjudged, and decreed by the court here that the said decree of the special term be, and the same is hereby, reversed, and that the bill of complaint be, and the same is hereby, dismissed with costs, to be taxed by the clerk, and that the defendants have execution therefor.

JULY 6TH, 1880.

157 *Appeal.—Filed July* 20, 1880.

In the supreme court of the District of Columbia.

THE W. AND G. R. R. CO. *vs.* THE DISTRICT OF COLUMBIA. } Equity. No. 5673.

And now comes the said Washington and Georgetown Railroad Company and appeals to the Supreme Court of the United States from the decree rendered herein on the 6th day of July, A. D. 1880.

ENOCH TOTTEN,
Solic'r for Appellant.

158 In the supreme court of the District of Columbia.

Bond of appeal.—Filed July 28th, 1880.

THE WASHINGTON AND GEORGETOWN RAILROAD Company *vs.* THE DISTRICT OF COLUMBIA. } In equity. No. 5673. In error.

Know all men by these presents that we, The Washington and Georgetown Railroad Company and George W. Riggs, are bound unto the abovenamed The District of Columbia in the sum of two thousand dollars, to

be paid to the said District of Columbia; to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 28th day of July, A. D. 1880.

Whereas the above-named Washington and Georgetown Railroad Company has prosecuted its appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Washington and Georgetown Railroad Company shall prosecute its said appeal to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

H. HURT, *P't.*
GEO. W. RIGGS.

Sealed and delivered in presence of—
CHAS. C. GLOVER.

Approved.

W. S. COX, *Justice.*

I admit the sufficiency of this bond.

FRANCIS MILLER,
A. A., D. C.

159 *Citation.*

DISTRICT OF COLUMBIA, *to wit:*

To the District of Columbia:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the supreme court of the District of Columbia, wherein The Washington and Georgetown Railroad Company is plaintiff and appellant and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

[SEAL.]

Service acknowledged.

FRANCIS MILLER,
Ass't At'y, D. C.

160 *Authentication of record.—Clerk's certificate.*

Clerk's office, supreme court of the District of Columbia.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and

of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 23d day of September, 1880.

[SEAL.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

Justice's certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 23' day of Sept., 1880.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's certificate to justice's official character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 23rd day of Sept., 1880.

[SEAL.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

(Indorsement on cover:) No. 279. The Washington and Georgetown Railroad Company, appellant, vs. The District of Columbia. Dist. of Col. supreme court. Filed 25' September, 1880.

OFFICE SUPREME COURT U.S.
FILED
APR 19 1883
JAMES H. McKENNEY, Clerk.

108-622

IN THE

Supreme Court of the United States.

No. 279.—October Term, 1882.

The Washington & Georgetown R. R. Co., Appellant,

vs.

The District of Columbia et al., Appellees.

BRIEF FOR APPELLANT.

ENOCH TOTTEN,

For Appellant.

J. L. Pearson, Printer, 9th and D sts., Washington.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1882.

THE WASHINGTON & GEORGETOWN RAILROAD COMPANY, APPELLANT,
vs.
THE DISTRICT OF COLUMBIA ET AL., APPELLEES.
No. 279.

Brief for Appellant.

The complainant in this cause, on the 9th day of July, 1877, exhibited its bill in the court below praying an injunction against the District of Columbia, its Commissioners, and others, to restrain them from issuing certain certificates for a pretended assessment made against the company under the act of Congress approved July 19, 1876, authorizing the repaving of Pennsylvania avenue.—(19 Stat., 92.) The complainant complains that the paving commission laid alongside of the outer rails of its railroad tracks, elaborately-dressed blue stone, in violation of the authority and directions of the statute, and that the municipal officers of the District of Columbia undertook, without authority, to impose unauthorized charges upon the railroad company, contrary to the provisions of the special statute.

This statute is set out here in full:

"AN ACT authorizing the repavement of Pennsylvania avenue.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President of the United States be, and he is heroby, directed to detail General H. G. Wright and General Q. A. Gillmore, of the Engineer Corps of the Army, who, with Edward Clark, of Washington, District of Columbia, shall form a commission, *whose duty shall be to select and determine the best kind of pavement to be used in paving Pennsylvania avenue* and all intersections of streets, avenues, and alleys crossing the same, including the triangular spaces directly connecting with the Pennsylvania-avenue pavement, abutting on parts of squares numbered two hundred and fifty-four, two hundred and fifty-six, three hundred and twenty-three, three hundred and forty-eight, and four hundred and eight, *but not including the side-walks; and to have said thoroughfare paved therewith from the northwest gate of the Capitol-grounds, to and including the crossing of Fifteenth street west, with such a pavement as they, or a majority of the said commission, may agree upon.*

"SEC. 2. That within ten days after the passage of this act, or as soon thereafter as may be, the commission named herein shall meet and organize by the election of a president and secretary from among their number, and shall proceed to perform the duties herein imposed upon them; and as soon as practicable, they shall give notice for one week, in a daily paper published in each of the cities of Washington, Philadelphia, and New York, for proposals, with full specifications, for paving said avenue: *Provided*, That said pavement shall be of the best material laid in the most substantial manner, and without unnecessary delay; and that a good and sufficient bond to the United States, with sureties, to be approved by the commission, shall be exacted, guaranteeing that the terms of any contract or contracts shall be strictly and faithfully observed, and that the contractor shall keep the said pavement in good repair for the term of three years; *and said commission shall retain ten per centum of the cost of the work as an additional security* and a guarantee fund to keep the same in repair for the said term, which said percentum shall be invested in the bonds of the United States and the interest thereon paid to the said contractors.

"SEC. 3. That the *cost of laying down said pavement shall be paid for in the following proportions and manner: The Washington and Georgetown Railroad Company shall bear all of the expense for that portion of the work lying between the exterior rails of the tracks of the road, and for a distance of two feet from and exterior to the track on each side thereof, and of keeping the same in repair; but the said railroad company, having conformed to the grade established by the Commissioners, may use cobble-stone or Belgian rock in paving their tracks, or the space between their tracks, as the Commissioners shall direct.* The United States shall pay the cost of paving the spaces between its property and the part of the avenue to be paid for by said railroad company, and one-half of the cost of paving the intersection of the streets and avenues, less that to be paid by the railroad company, and the other half shall be paid out of the revenues of the District of Columbia, and the residue of the cost of such paving shall be paid as follows: One-third by the owners of private property lying and abutting on said Pennsylvania avenue, in proportion to their frontage thereon, as hereinafter provided; one-third by the United States; and one-third out of the general revenue of the District of Columbia; and the amount required to pay the part of said cost assumed by the United States shall be paid out of any money in the Treasury not otherwise appropriated; and the amount required to pay the part of said cost charged to the District of Columbia shall also be paid out of any money in the United States Treasury not otherwise appropriated, but the money so paid shall be reimbursed to the Treasury of the United States by the District of Columbia from money derived from taxation *upon the warrants or orders of said commission duly audited* in the Treasury Department: *Provided*, That the property owners of such parts of squares two hundred and fifty-four, two hundred and fifty-six, three hundred and twenty-three, three hundred and forty-eight, and four hundred and eight, as are abutting upon said pavement, shall be assessed at the same rate per front foot as the owners on Pennsylvania avenue; *And provided further*, That the space between Seventh and Eighth streets, opposite the locality now occupied by the Washington Market Company, shall be paid by the District of Columbia, unless the suit now pending as to the ownership of said ground shall be decided against the said District when the same shall be refunded, with legal interest, by the Washington Market Company to said District.

"SEC. 4. That *assessments shall be made by the Commissioners of the District of Columbia upon the owners of said private property on said avenue and spaces, and upon said railroad company respectively, provided for in section three of this act, and the sums so found collected by the collector of the District of Columbia*, and paid into the Treasury of the United States, where it shall be held as a special fund for the specific purpose herein named; and such fund, together with such sum as shall be found to be due and payable from the United States for its proportion of the cost of said pavement, together with the proportion due from the District of Columbia, shall be paid by the Secretary of the Treasury, *on the warrant or order of the commission, or a majority thereof, herein authorized, in such amounts and at such times as they may deem safe and proper in view of the progress of the work.*

"SEC. 5. That the cost of laying down said pavement, exclusive of the work charged to and paid for by the Washington and Georgetown Railroad Company, but including the removal of the present pavement, grading the avenue, and all other work and materials necessary to fully complete said pavement for use, *shall not exceed the sum of four dollars and thirty cents per square yard; Provided* said pavement shall be fully completed and ready for use December first, eighteen hundred and seventy-six.

"SEC. 6. That if the Washington and Georgetown Railroad Company, or any private citizen or other corporation or person, shall neglect or refuse to pay the amount assessed for the paving herein authorized, (within thirty days after the notification of such assessment shall have been published in one or more papers printed in the District of Columbia,) in front of, or adjoining their property, when the work so fronting or adjoining their property shall have been completed to the satisfaction of the commission provided for in this act, and assessed by the District of Columbia Commissioners, the said Commissioners of the District of Columbia *shall issue certificates of indebtedness against the property*, which certificates shall bear interest at the rate of ten per centum per annum until paid, and which, until they are paid, shall remain and be a lien upon the property on or against which they are issued. And if the said certificates are not paid within one year, the said Commissioners of the District of Columbia shall, upon the application of the holder thereof, proceed to sell

the property against which they are issued, or so much thereof as may be necessary to pay said tax; such sales to be first duly advertised, daily, for one week, in some newspaper published in the city of Washington, and to be made at public auction to the highest bidder; and a deed given by the said Commissioners of the District of Columbia in pursuance hereof shall be deemed and held to be a good and perfect title to any property bought at such sale hereby authorized; *Provided*, That the owner of said real estate shall have the right to redeem the property sold by paying the amount of purchase-money and ten per centum, with costs, on the amount of the said purchase, within one year from the date of the sale.

"SEC. 7. That the said paving-commission shall not repave that portion of Pennsylvania avenue between Ninth and Tenth streets on the north side of the railroad track, unless it may be necessary for them so to do to perfect the whole system. Where street-railroads cross Pennsylvania avenue, the pavement between their tracks shall conform to the kind of pavement used on the said avenue; and the companies owning these intersecting railroads shall pay for paving the same in the same manner and proportion as is required, by section three, of the Georgetown and Washington Railroad Company.

"SEC. 8. That it shall be the duty of the Commissioners of the District of Columbia to see that all water and gas-mains, service-pipes, and sewer-connections are laid without delay to the contractors before the pavement authorized by this act is put down; and it shall be the duty of the board of water-commissioners and of the Washington Gas-Light Company, under the directions of the said paving-commissioners, to take up, lay, and replace all gas-pipes, water-mains, and connections on said Pennsylvania avenue, at such time and places as said paving-commission may direct; and the old wood paving-blocks, which are required to be removed under this act, shall be delivered to the said Commissioners of the District of Columbia for such use or disposition as they may see fit to make.

"SEC. 9. That the sum of three thousand dollars is hereby appropriated out of any money in the Treasury of the United States not heretofore appropriated, and a like amount is directed to be paid by the District of Columbia Commissioners to the said paving-commission, to defray the necessary expenses of said commission.

"Approved July 19, 1876."

This commission, although required to "select and determine the *best kind* of pavement," actually used two kinds; one of these was manufactured of the natural stone known as "Neuchatel," and the other kind was manufactured of artificial stone. In addition to this departure from its statutory authority, the commission also determined, in order to protect the pavement, to and did put down a curbing along the outside of the exterior rails of the railroad track, but instead of selecting ordinary blue-stone or granite, they selected highly-dressed blue-stone imported from the State of New York, already dressed for that purpose. The expense of this stone was about $6.61 per square yard.—(4, 15, 21.) The cost of the pavement was limited by law to $4.30 per square yard; although this limitation did not apply to the work chargeable to the railroad. When the president of the company became aware of the intention of the commission to put this expensive curbing down, he had an interview with and was assured by the commission that the expense of this curbing should not be charged exclusively to the railroad company, but that it would be estimated with the general expense, and be divided proportionately amongst all those chargeable under the statute with the burthen of the pavement.—(3, 19, 43.)

The commission also made a contract with one Burrows, who performed work and furnished materials of the value of about $2,300, in re-setting curbs and re-laying foot-walks and making other repairs and alterations deemed necessary in consequence of the changed condition of the street. This sum was paid to Burrows, and a part at least was also estimated in the sum total of the expense and distributed.—(15, 20, 21, 38.)

The railroad company was required by the statute to conform to the "grade established by the Commissioners;" they lowered the grade considerably, and the company lowered its road (43) so as to conform to the grade so established. This cost the company about five thousand dollars. In excavating the street for the reception of the

foundation of concrete pavement, the commission dug out the earth below and next to the road-bed in such a manner as to render necessary some kind of support for the stringers, and for that reason the railroad was in many places underpinned at an expense of over $1,000.—(4, 15, 38.) With this work the company had nothing to do.—(44.) The work was done by the commission and was paid for by them, and they charged the expense in the sum of the general expense and distributed it, but the Commissioners of the District of Columbia undertook to charge the whole sum upon the railroad. This is the second item about which the plaintiff complains.

After the work had been completed the paving commission stated an account of the whole cost, and then proceeded to apportion the amount amongst the various persons and corporations chargeable therewith, according to the third section of the act. In this apportionment they charged the railroad company with the sum of $12,207.27 as its proportionate share of the expense of the improvement; this account and apportionment was forwarded to the Secretary of the Treasury, and subsequently came into the hands of the Commissioners of the District of Columbia; they thereupon set about making an arbitrary and a different distribution of the burthen of the improvement, and undertook to charge the complainant with the sum of $19,886.69, instead of the said sum found to be due and charged to the complainant by the said paving commission, the difference in the said sum being made in an effort to charge the total expense of the said blue-stone curbing and of the underpinning to the railroad company.—(4, 21.) These charges against the railroad are as follows:

For 2,375.47 yards of pavement at $3.78 per yard	$8,979 27
For 13,537.19 linear feet of curb at 70 cts	9,476 59
For 13,584.49 linear feet of underpinning at $.07 1½	1,052 12
For incidentals	378 71
	$19,886 69

The District Commissioners thereupon gave public notice under the statute, and threatened to issue certificates of indebtedness in consequence of such pretended assessment. The railroad company was at all times able and willing to pay the said sum of $12,207.27, assessed by the paving commission; and it had no notice of the assessment made by the Commissioners of the District of Columbia until the advertisement appeared, nor was any demand for the payment of the same ever made against it. Thereupon the complainant came forward and filed its bill, offering to pay into court the said sum of $12,207.27, and praying that the Commissioners be restrained from taking any further action in the pretended assessment and threatened issue of certificates. The cause came on to be heard on the 16th of July, 1877, on the motion of the complainant for a restraining order; after argument the court, at special term, passed an order that upon the payment by the complainant to the defendant of the sum of $12,207.27, the defendants should be restrained according to the prayer of the bill, and from issuing any certificate or certificates against the property of the company, or any part of it.

Subsequently testimony was taken, and the cause came on regularly for hearing on the pleadings, exhibits, and testimony, and on the 29th day of November, 1879, the court made a decree granting a perpetual injunction against the defendants, restraining them from issuing any certificates on account of the assessment made by the Commissioners of the District of Columbia against the said company for paving Pennsylvania avenue, &c. From this decree the defendants appealed. On the 6th day of July, 1880, (53,) the General Term reversed this decree and dismissed the complainant's bill.

Assignment of Errors.

The court below committed errors in holding as follows:

First. That the paving commission had power, after having selected and determined "the best kind of pave-

ment" for paving Pennsylvania avenue, to lay the curb of blue-stone, described in the proceedings, along the outside of the exterior rails of the complainant's railroad tracks.

Second. That the expense of said curb and of the underpinning was lawfully chargeable against the railroad.

Third. That the Commissioners of the District of Columbia possessed lawful power to revise and modify the judgment and action of the paving commission as to the apportionment of the cost of the pavement.

Fourth. That the bill of the complainant should be dismissed.

POINTS AND AUTHORITIES.

First. It is contended on the part of the complainant that the paving commission had no authority to select more than one kind of pavement for the purpose of paving Pennsylvania avenue, and by selecting two kinds of pavement they exceeded their power. The complainant also contends that the paving commission had no right whatsoever to put down any kind of stone next to the outer rail of the complainant's tracks. There is no question here about the paving between the outer rails of the tracks. The company is, by its original charter, bound to keep said tracks, and for the space of two feet beyond the outer rail thereof, and also the space between the tracks, at all times, well paved and in good order, without expense to the United States or to the cities of Washington and Georgetown.

The paving commission derived its sole power and authority from the act creating it, and when the commission undertook to depart from its terms and to put down this highly dressed blue-stone, they were acting entirely without warrant of law. The complainant, however, does not complain of this, provided it is charged only with its proportionate share. The commission would probably have been interfered with by the company by injunction or

otherwise had it not been agreed, before the work was proceeded with, that the expense of this curbing should go into the sum-total of the cost, and be distributed proportionately amongst the persons bearing the burthen of the improvement. If the paving commission had the authority to put down this blue-stone, they also had authority to put down silver bullion or gold nuggets, and the railroad company was at the mercy of the paving commission; and, if the theory of the Commissioners of the District of Columbia was correct, all that was necessary to ruin the company was for the paving commission to put down gold nuggets and for the Commissioners to assess the value thereof against the company.

Second. The paving commission was the lawful agent of all the parties in interest; they substantially agreed with the railroad company, before the objectionable material was used for curbing in conjunction with the selected pavement, that the expense should form a part of the whole cost and that the company would be called upon to pay only its proportionate part; this agreement was binding on all parties. The statute proceeds upon the theory that there must be a proportionate distribution of the expense. Of course it would have been an impossibility to ascertain and declare the *exact expense* of paving the two feet next to the outer tracks without making a separate contract. These two feet of the pavement necessarily formed a part of the whole pavement, and could not be made separately any more than could the cost of these two feet be segregated from the whole. The statute required that the cost of laying down the pavement in question should be paid for according to certain "proportions." The word "proportion" means a "comparative relation of one thing 'to another in respect to size, quantity, or degree."—(Worcester.) The curb was a part of the pavement and was not for the benefit or advantage of the railroad.

The underpinning was no part of the work required to be done by the railroad. The company had reduced the

grade and lowered its track so as to conform to established grade; this underpinning was no part of the pavement.

Third. The Commissioners of the District of Columbia were wholly without power to revise and modify the apportionment made and declared by the paving commission. The whole work was under the exclusive control of the special commission. The act declares that the *cost* of laying the pavement shall be paid for in certain proportions; this created the necessity of keeping an account of the expense, which duty clearly rested upon the paving commission. The law contemplated that the work of paving the street should be done by contract, which necessarily involves an idea of an aggregate expense and an apportionment; measurements and estimates were to be made, and money was to be *paid* and money was to be *withheld* by the paving commissioners; they were especially authorized to draw orders on the Treasury for the proportionate parts of the expense chargeable to the United States and the District of Columbia. This power is inconsistent with the argument that any other power might determine the respective " proportions " of the expense. The statute declares that the sums collected from those who were chargeable with the cost of the pavement, together with the proportions of the cost to be paid by the United States and District of Columbia, "*shall be paid by the Secretary of the Treasury, on the warrant or order of the commission, or a majority thereof, herein authorized, in such amounts and at such times as they may deem safe and proper, in view of the progress of the work.*" These paving commissioners could not issue warrants or drafts for the payment of the proportion of the cost due from general and municipal government, without knowing at least approximately what the amount was, and that amount could not be ascertained until the whole cost was ascertained and the other proportions ascertained and declared also.

The third section of the act prescribes the rule for de-

claring the "proportions," and the fourth section makes it the duty of the Commissioners of the District of Columbia to make the "assessments" upon the persons and corporations chargeable with the expense, "*as provided for in section three.*"

The Commissioners of the District of Columbia were possessed and in control of all the records and machinery for the collection of taxes and assessments, and it was natural that the duty of collecting the funds should be put upon them. But this was all that was done. There was no supervising power over the paving commission vested by the statute in the Commissioners of the District of Columbia or in anybody else.

The only duty imposed upon the Commissioners of the District of Columbia by the statute was to make the formal assessment according to the distribution, and then to collect the money and pay it over as directed. To make the assessment was only to declare the result of the distribution made by this paving commission, to advertise the same according to the terms of the statute, and to issue the certificates in case of the non-payment of the amount.

When a public officer or a commission composed of public officers, is charged by law with the duty of completing a public improvement the expense of which is to be apportioned according to certain prescribed rules laid down by the statute, the duty of making such apportionment is imposed upon them, and the statute being imperative and being the sole source of power, the action of this paving commission, in making distribution of the expense, was final and conclusive.

It seems to be well settled that the action of boards of public officers, in charge of public improvements, in cases like this, is final.—(Rogers vs. St. Paul, 22 Minn., 494; Carpenter *vs.* Same, 23 Minn., 232; Cunningham *vs.* Same, 28 Minn., ; *In Re* Ward, 52 N. Y., 395; Cooley on Tax., 451; 48 Ill., 285, 293.)

The pretended assessment made by the Commissioners of the District of Columbia is grossly unjust and unequal, and seeks to charge the complainant about $6.61 for that which others are charged for at the rate of $3.78, and the cost of which, the law declares shall not exceed $4.30. The last class of limitations on the taxing power, as to "the manner of levying the tax, are those which have their foundation in natural justice. That such exist is clearly established by the authorities."—(Black. on Tax Titles, 7; 5 Dana, 31; 9 Dana, 516; 4 N. H., 556; 6 H. & J., 382; 6 Barb., 209; 20 Mich., 474; *Phila. Assn. vs. Wood*, 39 Penn. St., 73.)

See also on the subject of equality before the law: *Wally's Heirs vs. Kennedy*, 2 Yerg., 554; *Durham vs. Lewiston*, 4 Greenleaf, 140; *Holden vs. James*, 11 Mass., 396; *Pequit's Appl.*, 5 Pick., 64; *Budd vs. State*, 3 Humph., 483; Cooley's Lims., 389, 394; *Drake vs. Janesville*, 28 Wis., 464; *Bull vs. Conroe*, 13 Wis., 238.

Citizens cannot be deprived of their property by legislative enactments.—(*Wilkinson vs. Leland*, 2 Peters, 65; *Taylor vs. Porter*, 4 Hill, 145; *Pumpelly vs. Green Bay Co.*, 13 Wall., 166.)

It may be useful in this connection to look into the charter of this company for the purpose of ascertaining to what extent the law-making power may, through "special assessments," appropriate the property of this corporation for public use without compensation. The record shows that Pennsylvania avenue has been twice paved within the past few years, (42 and act of July 8, 1870, 16 Stat., 196,) and that the complainant was subjected to heavy expense in consequence. The fourth section of the charter makes it obligatory upon the company to keep the space between the tracks, and for two feet beyond the exterior rails, at all times well paved and in good order. That section is as follows:

"The said corporation, hereby created, shall be bound to keep said tracks, and for the space of two feet beyond

the outer rail thereof, and also the space between the tracks, at all times well paved and in good order, without expense to the United States or to the cities of Georgetown and Washington."

The fair interpretation of this statute is that the company must keep that portion of the street mentioned, in good repair. An obligation to "repair" a street does not convey an obligation to rebuild a new pavement.—(Sheldon *vs.* Chicago, 9 Wall., 50.) The fourth section contains a provision requiring the company, in the event of any improvement or alteration of the grade of Pennsylvania avenue by the government, "to change their said railroad so as to conform to such other grade and pavement."

The sixth section reserves the right to Congress to alter, amend, or repeal the charter.

It can hardly be said that these provisions authorize the confiscation of the company's property through the instrumentality of "special assessments." It is contended that the proof in this case shows that neither this bluestone curb nor the "underpinning" benefitted the railroad company in the least, and if this be the fact, upon what principle can this "assessment" be supported?

Every statute authorizing special assessments for the improvement of streets, &c., must rest and be upheld on the idea of an increase of the value of the property, in consequence of the improvement, equal to the expense. They can be sustained upon no other ground.—(Cooley on Law of Taxation, 416; *Shenly vs. Commonwealth*, 36 Penn. St. 29, 57; *Wright vs. Boston*, 9 Cush., 233, 241; *McGonigle vs. Alleghany*, 44 Penn. St., 118, 121; *People vs. Mayor of Brooklyn*, 4 N. Y., 420; *State vs. Mayor, &c.*, 36 N. J., (L.) 478; *Hale vs. Kenosha*, 129 Wis., 599; *Emery vs. San Francisco Gas Co.*, 28 Calif., 345; *Taylor vs. Palmer*, 31 Calif., 240; *Thomas vs. Gain*, 35 Mich., 155.)

This is a proper case, in view of the authorities, for the interference of a court of chancery to restrain the at-

tempted levying of an unjust tax. The cases wherein equity jurisdiction may be invoked to interfere with the collection of an erroneous or illegal assessment of tax by injunction are: For fraud, accident, or mistake; when the proposed action will create a cloud upon the title; or will produce irreparable mischief; or when the enforcement of the assessment will lead to a multiplicity of suits; or when the assessment on the face of the proceedings is valid, and extrinsic evidence will be required to disclose its invalidity.—(Cooley on Taxation, 536; *Dows vs. Chicago*, 11 Wall., 108; *Hayward vs. Buffalo*, 14 N. Y., 534; *Scott vs. Onderdonk*, 14 N. Y., 1; *Thomas vs. Gain*, 35 Mich., 155.)

It is submitted that the decree of the general term should be reversed and that the decree of the special term should be reinstated.

ENOCH TOTTEN,
for Appellant.

108-522

IN THE

Supreme Court of the United States.

No. 279.—In Equity.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY

vs.

THE DISTRICT OF COLUMBIA.

ON APPEAL FROM THE SUPREME COURT OF THE DISTRICT BY THE PLAINTIFF.

BRIEF FOR THE DEFENDANT.

A. G. Riddle,
Attorney for District of Columbia.

Judd & Detweiler, Printers.

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BRIEF FOR THE DEFENDANT.

Bill to enjoin the issuing of certificates of indebtedness for non-payment of assessments against the railroad for paving Pennsylvania avenue by the commission under the act of Congress of July 19, 1876.

Heard on bill, answer, exhibits, and evidence.

THE CASE MADE BY THE BILL AND ANSWER AND PROOFS.

Abstract of the Bill.

First paragraph sets out corporation and organization of the plaintiff under the act of incorporation of May 17, 1862.

2d. Its rail-track is laid on Pennsylvania avenue, which was to be repaved under the act of July 19, 1876, and which constituted Generals Wright and Gilmore, and Clark, architect of the Capitol, a commission to execute the law.

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THE CASE MADE BY THE BILL AND ANSWER AND PROOFS.

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2d. Its rail-track is laid on Pennsylvania avenue, which was to be repaved under the act of July 19, 1876, and which constituted Generals Wright and Gilmore, and Clark, architect of the Capitol, a commission to execute the law.

3d. The commission executed two contracts with two paving companies to pave the avenue, which are attached as Exhibits A and B.

4th. Also a contract with Burrows to reset man-holes, stop-cock boxes, and do certain brick-work on the avenue and sidewalks; entered into by proposals and acceptance.

5th. Sets up the old wooden pavement on the avenue under the act of July 8, 1870, which was an illy-advised and badly-done piece of work, and a fraud on the plaintiff and other tax-payers.

6th. The new commission changed the grade of the avenue, and the rail-track had to be lowered and the company compelled to pave with the Belgian block.

7th. By the third section of the act of July 19, 1876, the plaintiff was charged with the cost of laying down the pavement between two lines, two feet exterior to the outer rails of its track, and the commission, without consulting the company, placed a costly bluestone curbing along the outer rails of said track, which was wholly unnecessary for the company, and a less expensive stone would have been as good for the street, and alleges the commission had no authority to place the same along said track. The company was informed that the cost would be charged to the general expense of the work and not to the plaintiff specially.

8th. Denies that the commission had power to make its contract with Burrows to reset the curb along the sidewalk, grade and repave the sidewalk, and in these respects the contract was void, and the costs could not be legally charged against tax-payers, especially no part of it to the plaintiff. The whole contract amounted to $2,308.04. Said work was justly the duty of the District of Columbia to see performed.

9th. That after the reduction of the plaintiff's track, by reason of digging and carrying away the earth of the avenue, it became necessary to underpin the track to keep it in place, the expense of which should not be charged to the plaintiff.

10th. The plaintiff did all the paving within its two outer rails, and the commission having completed its work, estimated the entire cost and apportioned it among the several corporations and persons chargeable under the act, and reported it to the Commissioners of the District of Columbia, (see Exhibit D.) The Commissioners of the District disregarded it and their own duty in the premises, and unlawfully set it aside, and in their assessment upon the plaintiff included the whole cost of said bluestone curb, the expense of underpinning the track, and its portions of the incidental expenses of resetting the sidewalk, curbing, &c., amounting to the sum of $19,886.69, whereas the amount charged to it by the paving commission was $12,207.27. The Commissioners of the District gave the plaintiff notice that unless its assessment was paid in thirty days they would issue a certificate of indebtedness against its property.

11th. Says that the pavement of the avenue in 1870 cost the company $23,191.85, which was an unlawful and ruinous charge. Denies that Congress has the power to compel it to repave between its tracks when the same is in good repair.

12th. That the act of July 8, 1870, charged the cost substantially as does that of July 19, 1876.

13th. While grumbling about the Belgian block and other unlawful assessments, says the plaintiff is willing to pay said sum of $12,207.27, and offers to bring the same into court, (which, under a subsequent order of the court, it did.)

14th. Denies that Congress can discriminate between the plaintiff and other tax-payers; alleges that the cost of the bluestone is in excess of all that can be justly charged to it under the act.

15th. District Commissioners threaten to issue certificates of indebtedness against the plaintiff's property, which will appear perfect on their faces and constitute a lien and be an irremediable injury to the plaintiff.

16th. Many other tax-payers involved and interested, but the statement is wholly inconsequent.

PRAYER

for an injunction to restrain the issuing of certificates of indebtedness.

NOTE.—It is thus seen that the plaintiff alleges three grounds of complaint.

1st. It is wrongfully charged with the costs of the bluestone curbing along its outer rails.

2d. With the cost of underpinning its track.

3d. With some amount covered by the Burrows contract.

These last are too vague and indefinite to constitute any distinct grounds for relief, and are evidently thrown in as possible make-weights.

ABSTRACT OF THE ANSWER, (P. 18.)

1st. Admits 1st paragraph of bill.

2d. Id., the 2d.

3d. Id., the 3d substantially.

4th. Knows little of the Burrows contract.

5th. As to the 5th, alleges that it should be supplemented with a charge of fraud direct.

6th. Admits the 6th.

7th. Takes issue with the 7th; alleges that the blue curb is useful to the plaintiff and made necessary to the carriage-way wholly by the railroad track. The paving commisssion did not exceed its power. It had no power to assess or distribute the cost among the tax-payers.

8th. Denies that the 8th paragraph makes any case; alleges that as an incident to the necessary lowering of the grade of the avenue all the Burrows work was necessary. The man-holes had to be lowered, the curb reset, and certain portions of the sidewalk taken up and of course replaced. Denies that any part of the cost of this work entered into the assessment of the $19,886.69 upon the plaintiff.

9th. Adjusting the grade of the avenue was a part of the duty of the paving commission, and the underpinning of the plaintiff's tracks was an incident to that and properly chargeable to the plaintiff.

10th. Admits Exhibit D; alleges the assessment by the defendant's Commissioners was sound and correct, under the act of July 19, 1876; admits intention to issue one certificate of indebtedness.

11th. Has no knowledge of the statements of paragraph 11 of the bill.

12th. Denies paragraph 12.

13th. Is willing to receive the $12,207.27, and insists that the plaintiff is liable for the whole assessment.

14th. Denies that the plaintiff should be taxed at the same rates of other tax-payers. Denies that the cost of the bluestone exceeds the cost of what is justly assessable under the act to the plaintiff. The stone cost $9,476.59, and the other assessment covers $10,410.10.

15th. Will issue a certificate of indebtedness, as the act of July 19, 1876, commands.

16th. Admits that other parties are assessed, all of whose names are given in defendant's Exhibit A; that none of them can be justly charged with the cost of the bluestone curbing, which can only be legally charged to the plaintiff.

NOTE.—It is thus seen that the defendant admits that the cost of the bluestone curbing along the plaintiff's outer rails is charged wholly upon the plaintiff, and alleges that it is pursuant to the act.

2d. It makes the same claim in reference to the cost of underpinning its track.

3d. It denies that any part of the work done under the Burrows contract was charged to the plaintiff, though it might rightfully have been.

THE ACT OF JULY 19, 1876, (19 STATS., P. 92.)

The first section constitutes Gen. Wright, Gen. Gilmore, and Clark, architect and superintendent of Capitol Grounds, a commission to pave Pennsylvania avenue from the Capitol to the Treasury building, not including the sidewalks.

Second 2 provides for organization of the board, publication of notice for proposals, and requires that the pavement shall be of the best material and laid in the most substantial manner, the commission to take bond from the contractors to keep the same in repair, and also retain 10 per cent. of the price paid to secure performance of the undertaking.

Section 3 provides for the cost of the work.

The Washington and Georgetown Railroad Company to pay cost of paving the space included within lines two feet outside of their exterior rails. The United States to pay for paving in front of its property and one-half the cost of paving intersecting streets and avenues, the other half by the District of Columbia; of the residue, one-third shall be paid by private property owners, assessed by frontage, one-third by the District, and one-third by the United States. Special

provision for that part fronting on the Washington Market Company, the United States to pay for the District in the first instance.

Section 4 requires assessments to be made by the Commissioners of the District of Columbia on private property owners and the railroad companies, and money to be paid into the Treasury to reimburse the United States, the United States meantime to pay for the work as it progressed on the warrants drawn on the United States Treasury.

Section 5 declares that the cost shall not exceed $4.30 per square yard, the work to be done December 1, 1876.

Section 6. The assessments on railroad companies and individuals to be paid within thirty days after notice, when the work has been done to the satisfaction of the commission and assessed by the Commissioners of the District. The Commissioners of the District shall issue certificates of indebtedness against the property, if the assessments are not paid, bearing interest at 10 per cent., and are a lien on the property, and if the same are not paid within one year the property shall be sold; Commissioners to make deeds, with a right to redeem reserved to the owners.

Section 7 directs that the north side of the avenue, between 9th and 10th streets, need not be paved unless commission deem it necessary, and regulates street railroads crossing the avenue, and how they shall pave.

Section 8. Commission shall see that all gas and water-mains and service-pipes, all sewer connections, &c., shall be laid and adjusted before the pavement is laid—the gas and water-works placed under the control of the commission for this purpose; old paving blocks placed at the disposal of the District Commissioners.

Section 9 appropriates money to defray the expenses of the commission.

OBSERVATIONS.

It is thus seen that this is wholly a matter of the United States. The avenue is the property of the United States, improved under a special act of Congress by a commission created for that purpose. The United States in the first instance pays the whole expense, and is reimbursed in part by the District and the property owners of the District. Save as a payer of its part of the charge, the District has not the slightest interest in the case whatever—is in no way answerable for any failure or misconduct or excess of its powers by the commission. Instead of using the commission or any of the officers of the United States, as the Interior Department, for instance, to make and collect the assessments on private property owners, the United States employs the agency of the United States Commissioners of the District for that purpose. In the discharge of this function they are the servants of the United States, and not of the District of Columbia in any sense whatever. When reference is had to the contracts between the commission and the contractors who did the work, made exhibits to the bill and parts of the bill, it appears that these contractors were to be paid by warrants drawn on the Treasury of the United States, and that the commission limited itself strictly to its powers and duties under the law. The tax assessed is a tax levied by the United States.

EVIDENCE.

The plaintiff took the depositions of Clark, one of the paving commission.

He said that the blue curbing was not for the benefit of the plaintiff's track, but to protect the pavement from the vibration of its stringers, and was as cheap as any roughly-hammered stone; that the cost of this and of the work done under the Burrows contract was placed in with the general costs of the work by the commission.

When the excavation was made for the concrete bed it

went below the stringers of the railroad track, which had to be supported by underpinning. Thinks this work went into the Burrows bill under his contract also.

Also, the deposition of Henry Hurt, the president of the plaintiff's company. He deposed about the cost of the old wooden pavement; also, as to the whole cost under the act of July 19, 1876; that the railroad company did not pay for the underpinning of its track. (P. 36.)

NOTE.—Thus, the only matter left is, whether the cost of the bluestone curbing is chargeable to the plaintiff under the act of July 19, 1876.

POINTS.

On hearing below the chancellor, McArthur, held with the plaintiff and made the preliminary injunction perpetual, and the defendant appealed.

On this whole case I make these points:

I.

The suit is improperly brought against the District of Columbia, which cannot be made answerable for the breach of duty on the part of the United States.

II.

The court has no power to enjoin the impending action of the Commissioners in the premises.

Sec. 3224, Rev. Stat., 622.

State R. R. Tax Cases, 2 Otto, 613.

III.

The bill, taken with the exhibits, show no departure by the commission from a strict construction of its powers and duties under the act of Congress.

It did not attempt to grade and pave the sidewalks.

The resetting the curbstones, plumber's work, &c., was clearly within the functions of the commission under the act in the repavement of the street and incidental to regrading the avenue. See Stipulation, p. 47.

However this may be, it is very clear that no part of this expense is included in the assessment against the plaintiff.

IV.

Clearly, under the law, the whole cost of the blue curbstone is chargeable to the plaintiff.

The first clauses of section 3 of the act declares "that the cost of laying down said pavement shall be paid for in the following proportions, to wit: *The Washington and Georgetown Railroad Company shall bear all the expense for that portion of the work lying between the exterior rails of the tracks of the road, and for a distance of two feet from the exterior of the track, on each side thereof, and keep the same in repair.*"

Obviously, this language, by itself or in connection with the whole act, does not mean that the whole cost shall be equally distributed over the whole surface of the street, and that the plaintiff shall pay just so much as covers the part set apart to it. But it does mean that it shall pay all the cost incidental to laying the pavement, for all the work done within its designated lines.

Its presence on the avenue made this curb a necessity. The curb itself makes five inches of the surface of the pavement. Why should not the plaintiff pay for it?

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